1995

The George Fisher, Jr. Family Inter Vivos Revocable Trust; LaRue Fisher, indivdually; LaRue Fisher, Trustee, Brent Elmer Fisher, Trustee, The George Fisher, Jr. Family Trust v. Max George Fisher and Joyce Fisher : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE GEORGE FISHER, JR. FAMILY INTER VIVOS REVOCABLE TRUST, LARUE FISHER, individually; LARUE FISHER, trustee and BRENT ELMER FISHER, Co-Trustee,	:	
Plaintiffs and Appellants,	:	950089CA
v.	:	
MAX GEORGE FISHER and JOYCE FISHER,	:	Case No. 950089-CA
	:	Priority No. 15
Defendants, Appellees and Cross Appellants.	:	

BRIEF OF APPELLEES AND CROSS-APPELLANTS

Appeal from the Eighth Judicial District Court
Duchense County, State of Utah
Honorable A. Lynn Payne

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THE GEORGE FISHER, JR. FAMILY INTER VIVOS REVOCABLE TRUST; LARUE FISHER, individually; LARUE FISHER, trustee and BRENT ELMER FISHER, Co-Trustee, Plaintiffs and Appellants, v. MAX GEORGE FISHER and JOYCE FISHER, Defendants, Appellees and Cross Appellants.	Case No: 950089-CA Priority No. 15

BRIEF OF APPELLEES AND CROSS-APPELLANTS

STATEMENT OF JURISDICTION

This appeal arises from the final judgment of Judge A. Lynn Payne, Eighth Judicial District Court of Duchense County. The jurisdiction originally lay in the Utah Supreme Court pursuant to Utah Code Ann. § 78-2-2(3)(j). On February 3, 1995 this case was transferred to this Court pursuant to Utah Code Ann. § 78-2-2(4), and this Court has jurisdiction pursuant to Utah Code § 78-2a-3.

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

In addition to the Statement of Issues presented by the Appellants, Cross-Appellants (hereinafter "Max and Joyce" or "Defendants") present the following issues and standards of review to this Court:

I. THE TRIAL COURT ERRED IN FINDING THAT GEORGE FISHER JR. MADE AN ORAL AGREEMENT WITH MAX FISHER, POSTPONING PAYMENTS DUE UNDER THE ESCROW AGREEMENT, WHEN THERE WAS NO MEETING OF THE MINDS AS TO THE TERMS OF THE ALLEGED ORAL AGREEMENT.

The trial court found that an oral agreement, entered into by both George and Max Fisher modified the original escrow agreement. R. at 254 L. 8-13. To the degree that this was a factual finding, great deference is accorded to the finding of the trial court. Therefore, a trial court's finding must be "clearly erroneous" before an appellate court will overrule it. A person challenging a factual issue must "marshal all the evidence" to establish that the trial court's factual finding was clearly erroneous. Slattery v. Covey & Co., 857 P.2d 243, 249 (Utah 1993); Mostrong v. Jackson, 866 P.2d 573, 577 (Utah App. 1993); Utah R. C. P. 52(a).

Plaintiffs' requested standard of review on this issue (non-deferential review) is unfounded. The criminal case cited by Plaintiffs does not apply to contractual intent or payment

agreements such as the one at bar, nor does it support Plaintiffs' requested standard of review on this issue. State v. Pena, 869 P.2d 932, 938 (Utah 1994). Whether a party had contractual intent is a question of fact requiring a marshaling of the evidence. Fitzgerald v. Carbide, 793 P.2d 356, 358 (Utah 1990). Furthermore, the Utah Supreme Court has explicitly held that whether an agreement existed between parties as to how to pay a debt is a factual issue requiring the clearly erroneous standard. Mountain States Tel. & Tel. v. Sohm, 755 P.2d 144, 158-59 (Utah 1988).

II. THE TRIAL COURT IMPROPERLY REFUSED TO APPLY THE STATUTE OF LIMITATIONS TO THE MAJORITY OF YEARLY INSTALLMENT PAYMENTS UNDER THE ESCROW AGREEMENT WHEN PLAINTIFFS FAILED TO PURSUE ACTION WITHIN THE SIX-YEAR STATUTORY PERIOD.

Defendants raised the statute of limitations both by way of counterclaim (R. at 25) and in opposition to a motion to dismiss brought by Plaintiff. R. at 107. This issue was also extensively argued before the court and in Defendants' Trial Memorandum. R. at 216. In finding an oral modification of the contract, the trial court avoided ruling on the statute of limitations. R. at 254 L. 10-14. Whether the statute of limitations has expired is a question of law. Gramlich v. Munsey, 838 P.2d 1131, 1132 (Utah 1992); Hansen v. Department of Fin. Insts., 858 P.2d 184, 186 (Utah App. 1993). An appellate court reviews the trial court's

conclusions of law in civil cases for correctness and given no deference. Id.

III. THE TRIAL COURT IMPROPERLY FAILED TO APPLY THE EQUITABLE DOCTRINES OF WAIVER, ESTOPPEL AND LACHES IN THIS CASE WHEN GEORGE FISHER TOLD MAX AND JOYCE FISHER NOT TO MAKE THE YEARLY INSTALLMENT PAYMENTS AND MAX AND JOYCE ACTED IN RELIANCE UPON GEORGE'S REFUSAL TO ACCEPT PAYMENTS FOR APPROXIMATELY 19 YEARS WITHOUT REPRISAL?

The equitable defenses of laches, waiver and estoppel were raised in Max and Joyce's answer and more fully argued in their opposition to Plaintiffs' motion for summary judgment and in their trial memorandum. R. at 25-26; R. 111-115; R.213-216. Whether a legal or equitable doctrine should be applied to a particular factual situation allows a discretionary ruling by the trial court. State v. Pena, 869 P.2d at 936-39. The degree of deference allotted to the trial court's decision varies given the facts and legal issues involved in the decision. Id. Until an appellate court has determined that a particular fact situation does or does not satisfy the legal standard at issue, the trial court has discretion to venture into that area and make a ruling. Id. In this case, the trial court made specific findings of fact but did not address the laches and estoppel issues, even though these issues had been thoroughly briefed and argued before the court. Therefore, this Court should review the trial court's refusal to address these issues under the abuse of discretion standard.

The trial court did, however, rule that under the facts presented at trial, George Fisher did not waive his right to collect payment but merely agreed to extend the payment period for an indefinite time period. R. at 252 L. 18-19. A finding of intentional waiver under certain specified facts is a question of law, and the trial court's conclusion should be given no deference and reviewed for correctness. Soter's v. Deseret Federal Savings and Loan, 857 P.2d 935, 940-41 (Utah 1993).

IV. THE TRIAL COURT CORRECTLY RULED THAT FORFEITURE WOULD BE INEQUITABLE AND THIS FINDING SHOULD BE UPHELD BOTH BECAUSE IT IS WELL GROUNDED IN TESTIMONY AND EVIDENCE AND AS A MATTER OF LAW.

The trial court found that it was "extremely unjust" to allow George to instruct the buyers, Max and Joyce Fisher, not to make payments and then allow a forfeiture based upon reliance of the buyers in not making payments. R at 252 L. 22-23. A trial court's findings of fact will not be set aside on the appeal unless clearly erroneous. This clearly erroneous standard is also applicable in equity cases. Bellon v. Malnar, 808 P.2d 1089, 1092 (Utah 1991). In Bellon, also a forfeiture case, the Utah Supreme Court held that a trial court's determination of whether forfeiture is equitable is a question of fact and must be accorded great deference. Id. See also Bountiful v. Riley, 784 P.2d 1174, 1175 (Utah 1989) (holding that the same standard that applies to a trial court's finding of

fact applies also to a trial courts equitable findings); Ashton v. Ashton, 733 P.2d 147, 150 n. 1 (Utah 1987) (A trial court's finding of a constructive trust is an equitable finding which should be afforded the clearly erroneous standard). An appellate court will uphold an equitable finding by the trial court unless the great weight of the evidence mandates another conclusion. Bountiful, 784 P.2d at 1175. Therefore, the party wishing to have the trial court's finding overturned must marshal all the evidence to support that position. Id.

V. IN FINDING THAT THE CONTRACT HAD BEEN MODIFIED, THE TRIAL COURT ERRED BY CONCLUDING THAT INTEREST CONTINUED TO ACCRUE ON THE CONTRACT PRINCIPLE WHEN ALL THE EVIDENCE INDICATED THAT CONTINUED ACCRUAL WAS NEVER CONTEMPLATED BY THE PARTIES, GEORGE FISHER DID NOT EXPECT INTEREST TO ACCRUE AND THE PAYMENTS WERE WAIVED BY BOTH GEORGE AND LARUE FISHER.

The trial court's finding that the parties agreed to allow interest to accrue on the contract is a finding of fact which the Court reviews for clear error, and the party challenging the finding must marshal all the evidence to prove the error. R. at 258. Inasmuch as the trial court found that the parties orally agreed that interest to continue to accrue on the principal this is a factual finding. However, the record shows that Plaintiffs waived collection of interest. As discussed, above, a finding of intentional waiver under certain specified facts is a question of

aw and the trial court's conclusion should be given no deference and reviewed for correctness. Soters, 857 P.2d at 940-941.

STATUTES AND CONSTITUTIONAL PROVISIONS

In addition to the statute of frauds discussed in Plaintiffs' brief, the statute of limitations as specified in Utah Code Ann. § 78-12-23(2) (1984) will be at issue in the determination of this case. This statute reads: "Within six years: . . . (2) An action upon any contract, obligation, or liability founded upon an instrument in writing, except those mentioned in Section 78-12-22." Section 78-12-22 has no applicability to this case.

STATEMENT OF FACTS

On or about May 1, 1975, George and LaRue Fisher, husband and wife, conveyed approximately 600 acres to their son Max Fisher and his wife, Joyce, pursuant to a written escrow agreement. R. at 250 L. 5. The purchase price was $124,000, and Max and Joyce paid $8,280 as a down payment. R. at 250 L. 6. The contract called for yearly annual payments of $10,000 due May first and beginning in 1975. Interest was payable at the annual rate of 5 percent and specifically included in the annual payments. R. at 250 L. 6. Max and Joyce entered into possession of the property on or about May 1, 1974, and they have remained in possession since then. Id. A full copy of this escrow agreement is attached hereto as addendum

"A" and adopted into these facts by reference.

During the term of the agreement, the parties had several discussions concerning the annual payments. The first discussion, which was prior to the first annual payment becoming due, concerned whether Max and Joyce should make the payments. R. at 251 L. 15-16. At that time, George told Max that he should not make his payment but should invest the money by improving the property. R. 251 L. 19-20. George indicated that he did not need the money and that any money Max paid him would go to the I.R.S. R. at 394 L. 14-16; R. 342 L. 13-16. He then told Max that he would notify him when he should begin making payments. R. 251 at L. 21-22 R. 394 L.15-16.

In 1979, Max and Joyce sold $82,980 in cattle. During a conversation with George, Max and Joyce offered the entire amount to him as payment on the property. R.412-19. George again responded that he did not need nor want the money due to tax consequences and instructed them to reinvest the money into the property. Id. See Addendum C. Max insisted that his father take some of the proceeds, so George consented and took approximately $24,980 as payment on the property. Id.; R. at 257 at 4-5.

Again in 1980 or 1981, Max and George had another discussion concerning the payments. Again George instructed Max not to make

payments to him but to continue to invest the installment payments into improving the property. R. at 252 L. 8-11.

In 1988 or 1989, the home which had been on the property when it was purchased became unusable because of a cracked foundation, so it became necessary for Max and Joyce to either build or rent a home. R. at 252 L. 13-14. Max and Joyce spoke to George about this problem and indicated that they would either have to build a home on the property or purchase a home off of the property. George instructed them to build a new home, telling them once again not to worry about the annual payments and that he would not request the payments. R. at 252 L. 15-16. Relying upon George's statement, Max and Joyce built a new home and financed it by pledging their cattle and equipment as security. R. at 252 L. 17-18. Max and Joyce continue to be liable for the mortgage on the home that is now approximately $30,000. R. at 252 L. 17-18.

In reliance upon their discussions with George, Max and Joyce also invested their money into other improvements on the property rather than making the annual payments during the entire period of the loan agreement. R. at 252 L. 1-2. During that time, Max and Joyce built a new home and other buildings, installed sprinkling systems, cleared the land, and made numerous improvements to the

roperty which substantially increased the land's value. R. at 257 at 6-15.

During, the life of the loan and until after George Fisher's death (approximately one year after the last payment was due), neither George nor his wife LaRue, Plaintiff in this case, made any attempt to enforce the terms of the escrow agreement. R. at 252 L. 19-20. Furthermore, if there was any disagreement with her husband about the status of the sale of the farm to Max and Joyce, instead of taking any independent action, Joyce acquiesced to the will of her husband. R. at 255 L. 10-12. Finally, the record clearly demonstrates that LaRue Fisher did not ask for any payment on the loan until after George Fisher had passed away. R. at 254 L. 1-2.

Plaintiffs sent the first documented demand from plaintiffs in this matter to Max and Joyce on or about March 5, 1994. This correspondence, purporting to be a "Notice of Termination of Agreement" requested that Max and Joyce pay in full, but never specified the amount needed to rectify any alleged breach. Furthermore, Max and Joyce had no way of ascertaining this amount as the Plaintiffs failed to notify the escrow agent specified in the Escrow Agreement of the amount demanded. A copy of this

Notice of Termination of Agreement" is attached hereto as addendum "B" and adopted into these facts by reference.

Considering the above facts, the trial court found that an oral modification of the contract occurred between the parties. In ruling that this modification took place, the court also found that Max and George agreed that interest would continue to accrue on the principal until paid. The only evidence presented regarding whether interest would accrue was the testimony of James J. Oman. Mr. Oman testified that in a conversation between himself, George and LaRue he heard George state on two occasions that "'I don't think we should charge interest on it.'" R. at 526 L. 17. Defendants have been unable to find any other testimony or evidence presented to the trial court on this issue.

The trial court also found that from the date the first payment became due under the Escrow Agreement and at all times thereafter, Max and Joyce either had the money to make the annual payment or they could obtain the money from their bank whenever a payment was due. R. at 251 L. 18. Finally, the trial court found that under the above stated facts, forfeiture would be inequitable.

SUMMARY OF THE ARGUMENT

Plaintiffs correctly assert that the trial court erred as a matter of law in ruling that there was an oral modification of the

original Escrow Agreement. In Utah, the statute of frauds contained in Utah Code Ann. §§ 25-5-1, 3, and 4, prohibits any oral modification of a contract for the purchase of real property. The trial court violated the statute of frauds in finding an oral modification and should have looked solely to the four corners of the Escrow Agreement in determining the rights of the parties in this case. Plaintiffs' only remedies in this case are those they are legally entitled to under the Escrow Agreement.

In Utah, an action brought to enforce the terms of a written instrument must be brought within six years from the date of default in order to collect judgment. Utah Code Ann. § 78-12-23(2). As a general rule, a cause of action accrues upon the happening of the last event necessary to complete the cause of action. With installment contracts the cause of action ripens when the buyer fails to make a scheduled installment payment.

In the present case, plaintiff LaRue Fisher and Defendants' entered into an installment contract in which payments were due on an annual basis. However, after George told Max and Joyce not to pay, no payments were accepted or requested by either him or LaRue for over 19 years. After George's death in 1992, his wife LaRue

made the first request for payment under the Escrow Agreement and in June of the following year initiated this action.

Plaintiffs' claims for payment under the Escrow Agreement accrued individually with each payment's due date, beginning on May 1, 1975 and continuing annually until May 1, 1992 when the final payment of $7,717.96 was due and owing. Since this action was not initiated until June 1993, the statute of limitations time bars all claims arising prior to June 1987 (June 1993 minus six years). Therefore, Plaintiffs are only legally entitled to recover the amounts specified under the Escrow Agreement for the six years not barred by the statute of limitations (i.e., 1988--$10,000; 1989--$10,000; 1990--$10,000; 1991--$10,000; and 1992--$7,717.96), totaling $47,717.96.

As to the remaining amount, or in the alternative, if the statute of limitations does not apply as stated above, the equitable doctrines of waiver, estoppel and laches should be applied to the facts of this case. Waiver is an intentional relinquishment of a known right. The facts in this case are clear that on numerous occasions, George, with either the consent or acquiescence of his wife, instructed Max and Joyce not to pay the annual installment payments required under the Escrow Agreement. Based upon these requests, Max and Joyce reinvested the monies due

under the contract to improve the subject property. Accordingly, George and LaRue intentionally relinquished their right to collect the payments due under the Escrow Agreement.

Furthermore, a party may be equitably estopped from asserting a right to which he was legally entitled if by his actions he induces another to take action which will result in the second parties' harm. In the present case, George informed Max on several occasions that he did not need the money due under the Escrow Agreement and that he would tell Max when to resume making the payments. By not collecting these payments, George and LaRue benefited because of the tax consequences of not acquiring the extra income. Conversely, Max and Joyce, in reliance upon their father's representations, reinvested the annual payments into permanent improvements upon the property that will be forfeited with the property. Were this Court to allow Plaintiffs the relief sought, they would receive a double benefit from their actions, denying Defendants many benefit from the past 19 years of their labor. Not only have Plaintiffs received the tax benefits from the non-payments, but if allowed to recover the property, they would receive the property which has greatly increased in economic value due to Max and Joyce's reinvestment into the property. Furthermore, Plaintiffs would receive the monies already paid on

the property and the new property improvements including the new home. Therefore, this Court should find that Plaintiffs actions or actions taken in Plaintiffs' behalf and Defendants' subsequent reliance to their detriment upon these action should estop Plaintiffs from obtaining forfeiture and the amounts not barred by the statute of limitations.

Additionally, laches is an equitable defense that denies relief to one who has been guilty of unconscionable delay that would result in damages to one claiming the defense. Laches applies whether or not there are applicable statutes of limitations. In the present case, Plaintiffs have made no demand under the terms of the Escrow Agreement for approximately 19 years. The Utah legislature has proclaimed that six years is ample time in which to bring an action based upon a written agreement. This action to recover annual payments under the Escrow Agreement since 1975 was brought more that three times the length of time allotted in the statute of limitations. Review of the Utah Code suggests that 19 years is more than double any statutes of limitations in this state. This court should find as a matter of law that failure to act for 19 years is an unreasonable delay for any contract claim.

Furthermore, the trial court found that to grant Plaintiffs the desired relief under the escrow agreement, would irreparably harm Max and Joyce. Defendants have relied upon George Fisher's representations that he did not want payment under the terms of the Escrow Agreement and because of those representations, Max and Joyce put money into other investments. The trial court even found that as each individual payment became due, Max and Joyce could meet the payment obligations. Now, however, it would be an extreme burden upon them to require Max and Joyce to require all payments to be paid at once. Subsequently, Plaintiffs have requested forfeiture based upon Max and Joyce's actions taken in reliance upon George's requests. Were forfeiture to be granted, Plaintiffs would benefit from the vast improvements made to the property at the detriment to Max and Joyce.

Finally, Plaintiffs have raised many challenges to the factual findings of the trail court. It is well established that a party challenging a trial court's factual finding must marshal all the evidence to show that the lower court's findings were clearly in error. Once the evidence has been marshaled, the challenging party has a duty to show how the facts found by the lower court were legally insufficient.

Here, Plaintiffs have failed to both properly marshal the evidence and to show how the trial court's findings were legally insufficient. Therefore, this Court should deny Plaintiffs' requested relief on their challenges to the court's factual findings.

If this Court chooses to disregard the above law and uphold the trial court's finding of an oral modification, it should overturn the trial court's finding that the parties mutually agreed that interest should continue to accrue. First, the evidence does not support such a finding and furthermore, Plaintiffs have waived collection of interest by action and words. Therefore, this court should overturn the trial courts ruling on this matter.

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THAT GEORGE FISHER JR. MADE AN ORAL MODIFICATION OF THE ESCROW AGREEMENT WITH MAX FISHER, POSTPONING PAYMENTS DUE UNDER THE ESCROW AGREEMENT.

In addition to the statute of frauds arguments that Plaintiffs have delineated in their brief, the trial court's finding that the parties agreed to orally modify the terms of the Escrow Agreement is also in error due to a failure of the parties to come to a "meeting of the minds" in regards to the essential terms of the agreement. The parties to a contract may, by mutual consent, alter all or any portion of that contract by agreeing upon a modification

thereof.[1] Western Sur. Co. v. Murphy, 754 P.2d 1237, 1239 (Utah Ap. 1988). However, under basic contract law principles, a contract is not formed without a meeting of the minds. "Contractual mutual assent requires assent by all parties to the same thing in the same sense so that their minds meet as to all the essential terms." Id.

In order for a court to find a contract modification under this principle, it must find two necessary elements. First, there must be a meeting of the minds of all parties to the contract. Then, once the court finds that the parties mutually agreed to a modification, the court must find that all essential terms were agreed upon. Id.

Deciding whether the specific terms omitted were essential to the agreement requires an examination of the entire agreement and the circumstances under which the agreement was entered into. Id. Furthermore, a contract can be enforced by the courts only if the obligations of the parties are set forth with sufficient definiteness. When the parties leave material matters so obscure and undefined that the court cannot say whether the minds of the

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[1]The parties to the escrow agreement were Max and Joyce Fisher and George and LaRue Fisher. The trial court found, however, under the circumstances of this case, Joyce and LaRue allowed their husbands to conduct the business without objection and were therefore bound by their husband's actions.

parties met upon all the essentials or upon what substantial terms they agreed, the court should not enforce the contract. Southland Corp. v. Pott, 760 P.2d 320, 322 (Utah App. 1988).

The trial court in this case *sua sponte* ruled that the parties orally agreed to modify the contract. Specifically, the court ruled that the parties mutually "agreed to delay payments until the seller requested payments." The parties did not agree how long this modification would last, they did not discuss whether interest would continue to accrue, and they did not discuss what would be due once George decided to request payments. These issues are very material to the rights and duties of the parties. The failure of the parties to come to a meeting of the minds on these crucial issues precludes the finding of an oral modification of the terms of the Escrow Agreement and the trial courts finding on this issue must be overturned.

II. THE TRIAL COURT IMPROPERLY REFUSED TO APPLY THE STATUTE OF LIMITATIONS TO THE MAJORITY OF YEARLY INSTALLMENT PAYMENTS UNDER THE ESCROW AGREEMENT WHEN PLAINTIFFS FAILED TO PURSUE ACTION WITHIN THE SIX YEAR PERIOD.

In Utah, an action brought to enforce the terms of a written instrument must be brought within six years. Utah Code Ann. § 78-12-23(2). Statutes of limitations were designed to promote justice by preventing surprises through the revival of claims allowed to "slumber until evidence is lost, memories have faded and

witnesses have disappeared." Becton, Dickinson & Co v. Reese, 668 P.2d. 1254, 1257 (Utah 1983). To further this purpose, the general rule has been that a cause of action accrues upon the happening of the last event necessary to complete the cause of action. Becton, 668 P.2d at 1257; United Park City Mines Co. v. Greater Park City Co. et al., 870 P.2d 880, 890 (Utah 1993). With installment contracts, the cause of action ripens when the buyer fails to make a scheduled installment payment. Moab Nat. Bank v. Keystone-Wallace Resources, 517 P.2d 1020, 1023 (Utah 1973); Buell v. Duchesne Merc. Co., 231 P. 123, 124-25 (Utah 1924). In Moab Nat. Bank the Utah Supreme Court held that "while the entire note was not due and payable, nevertheless, the plaintiff could have commenced an action to recover the past due installment and that the statute of limitations would commence to run against the installment." 517 P.2d at 1023.

This case presents a classic example of the inequities the statute of limitations was designed to prevent. This contract was entered into between parents and son in May of 1974 for the purchase of 600 acres of ranching property. Yearly installments of $10,000 were due on the first day of May of each subsequent year until paid in full. Following this agreement, George Fisher told his son that "he did not then need the money and that Max should

continue to improve the property." R. at 251 L. 19-20. In reliance upon his father's representations, Max and Joyce, who had the money to make the payment, made substantial improvements to the property, complying with George's desires. R. at 251-252.

No demand for payment, either from George or LaRue, was ever made upon Max and Joyce until March 5, 1993, one year after George had passed away. Infact, over 19 years had passed before the sellers even chose to enforce the terms of the installment contract, and the record is clear that Max and Joyce did not avoid payment on the contract. Instead, the trial court found that they were able to pay at all times but did not do so due to the representations that George did not want the payments because of tax consequences. George preferred that Max and Joyce invest the money until he requested it, and they did as requested without any objection from LaRue. R. at 251 L. 15-16, 18; R. 252 L. 8-11.

Now, 19 years after the initial payments were due, LaRue Fisher attempts to enforce the contract terms as originally written. This situation is exactly what the statute of limitations was designed to prevent. Since the first cause of action accrued, and for the past 18 years, evidence has been lost, memories have faded and an essential witness and party to the contract has died.

Because this action was commenced in June of 1993, if this court finds that the equitable doctrines of waiver, estoppel and laches do not bar all of Plaintiffs' claims here, this Court should apply the statute of limitations and deny Plaintiffs' recovery for all payments that became due under the Escrow Agreement before June 1987.[2]

III. THE TRIAL COURT IMPROPERLY FAILED TO APPLY THE EQUITABLE DOCTRINES OF WAIVER, ESTOPPEL, AND LACHES IN THIS CASE WHEN GEORGE FISHER TOLD DEFENDANT NOT TO MAKE THE YEARLY INSTALLMENT PAYMENTS AND DEFENDANT ACTED IN RELIANCE UPON THESE REPRESENTATIONS FOR APPROXIMATELY 15 YEARS WITHOUT REPRISAL.

In addition to the statute of limitations, which prevents plaintiffs from recovering all claims except $47,717.96[3], defendants have several equitable arguments which should prohibit Plaintiff from any monetary recovery in this case.

A. Waiver

The equitable doctrine of waiver is defined as the intentional relinquishment of a known right. "To constitute waiver, there must be an existing right, benefit or advantage, a knowledge of its existence, and an intention to relinquish it." Soter's Inc. v.

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[2]Under the terms of the Escrow Agreement, Defendants were to make $10,000 payments each May 1, beginning 1975. The final payments of $7,717.96 became due on May 1, 1992. If this Court finds that waiver, estoppel and laches do not apply, at a maximum Plaintiffs should only be awarded $47,717.96 for the payments which became due after June 1987. ($10,000--May 1, 1988; $10,000--May 1, 1989; $10,000--May 1, 1990; $10,000 May 1, 1991; and $7,717.96--May 1, 1992).

[3]See Note 1 Supra.

Deseret Federal Savings & Loan, 857 P.2d at 942. In Soter's, the Utah Supreme Court held the intent to relinquish a right must be "distinct." Id. To decide whether an intent to relinquish it is distinct, a fact finder need only decide whether the totality of the circumstances "warrants the inference of relinquishment." Id. at 942 (citations omitted).

In the present case, there is no doubt that George and LaRue knew of their rights under the Escrow Agreement. The only question that this Court must answer is whether the totality of the circumstances warrants the inference of relinquishment. Here the trial court found and the record supports that there were never any discussions about how the nonpayment of the yearly installments was to be treated. R. at 252 L. 18-19. No testimony or evidence suggests when (if ever) the payments were to resume, under what term they were to resume or if interest was to continue to accrue. What the testimony does show is that George Fisher commanded Max and Joyce not to pay under the terms of the Escrow Agreement but to reinvest the money into the property.

The trial court found, however, that this instruction by George was not a waiver but instead constituted an oral agreement to modify the terms of the Escrow Agreement. As noted above, his conclusion is clearly erroneous and contrary to existing law.

Indeed, there is no precedent for treating a waiver of this type as an oral modification. The facts clearly support a finding that George and LaRue relinquished their rights under the Escrow Agreement and therefore waived their rights to collect such payments under the agreement at this late date.[4]

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[4]George and LaRue Fishers rights under the Escrow Agreement are as follows:

> in case the Buyers shall fail to make the payments aforesaid, or any of them punctually, and upon the strict terms and at the times limited, time of payment being of the essence of this agreement, or if they, the Buyers, shall breach any other covenant herein contained, then the Sellers, may, at their option, declare this agreement terminated and canceled by serving upon the Buyers a thirty (30) days written notice of their intention so to do . . .
>
> if the Buyers shall fail to make the payments due or fail to comply with any other covenants, within the period herein provided for in such notice, then all rights and interests of the Buyers shall thereupon terminate without further demand or notice . . . [and Buyers] shall become subject to the statutory action for unlawful detainer in the event possession of said premises and property are not delivered over to Sellers . . .
>
> In the event of a failure to comply with the terms hereof by the Buyers, or upon failure to make any payments when the same shall become due, or within thirty (30) days thereafter, the Sellers shall, at their option, be released from all obligations in law and equity to convey said property and all payments which have been made theretofore on the contract by the Buyers shall be forfeited to the Sellers as liquidated damages for the non-performance of the contract, and the Buyers agree that the Sellers may, at their option, re-enter and take possession of said premises without legal process as in its first and former estate, together with all improvements shall remain with the land and become the property of the Sellers, the Buyers becoming at once a tenant at will of the Sellers. It is agreed that time is the essence of this agreement.
>
> That time is the essence of this agreement and if the Sellers accept payment from the Buyers less than according to the terms herein mentioned, then by so doing, it will not, in any way alter the terms of the agreement as to the forfeiture herein contained.

See Addendum A.

Looking to the totality of the circumstances here, George and LaRue Fisher's waiver to their rights under the contract is unequivocable. The trial court found that several times, George Fisher instructed Max and Joyce "not to make payments to him but to continue to invest the yearly installment payments into improvements on the property."[5] R. at 252 L. 9-11.

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[5]At trial, Max testified as follow:

Q. . . . Was there ever any conversation between you and your father at the time you sold your dairy herd?
A. Yes.
Q. Okay. Now, could you describe---first of all when did that occur?
A. '79.
Q. And where did this conversation occur?
A. At my place.
. . .
Q. All right. Let's get back to the 1979 when you were in the corrals with your father and your wife. Why don't you go ahead and relate your recollection of the conversation.
A. Well, my father came down to the place and I told him that I had sold the milk cow and they were going to go to two individuals--two different individuals. Wally Stephensen was the one fellow and Jenkins--Howard Jenkin's family was the family was the other.

I said, "Father, I want you to -- your going to have to take part of this money." Or take this money. I wanted him to take it all but he says, "I don't want none of it. I can't use it."
Q. Okay. Wait just a moment. You say you wanted him to take it all?
A. Yes.
Q. What do you mean by all?
A. I wanted him to take both sales. They was two different--they was going to be two different--there was actually two different sales and I wanted him to take both sales of those cattle.
Q. And what was the dollar value of each of those sales, do you recall?
A. It's right there on the paper. The one of them was right at $25,000 and the other one was $56, 58. How much is it? It was $58,000.
Q. And so you say you offered your father the two sales, $58,000 and $25,000?
A. Yes.
Q. And what did your father say?
A. He says, "I don't want them. I can't use that money." He says, "I can't use that money."
Q. Excuse me, Max. Did he make--did he explain why he couldn't use the money?
A. He said it would just go to taxes. I didn't know his income. He said it would just go to taxes.

Q. So--
A. And I replied that you're going to have to take one. So he agreed to take the one draft.
Q. And--
A. And it was the smaller. He says, "I want the--if you're insisting, I'll take the smaller draft." And that was the Wally Stephensen draft.
. . .
A. This document [D-7] represent the draft that my father received from those cattle.
Q. Okay. And does that help you determine what the amount that actually went to your father as the sale of your cattle?
A. To the penny, $24,980.
. . .
Q. Did your father ever acknowledge to you that he had received the money.
A. Yes.

(R. 401-403)

The trial court found this testimony credible and did apply the $24,980 draft from the sale of these cattle to the contract price.

Max further testified that in 1988 he and his father, mother and wife were discussing the need for a new home on property because of structural damage to the old one. Max proposed to buy a house off of the ranch and to that his father replied:

A. . . . "you know that you can't do that." He says, "you can't live off of one of these ranches and run it." He says, "It's a deterrent to you." He says, "If you're going to run a place, you've got to live on it."
Q. Okay. And what was your response?
A. I says, "Well, what happens when enforce (sic) me to make these payments? I can't do it."
. . .
A. And he say, "Don't worry about it." He says, "I'm getting this taken care of as quickly as I can to make it equal with you kids." . . . He says, "you'd better build a home."
. . .
Q. Okay. Did your father did your father ask for payments.
A. No.
. . .
Q. Max, was there anything else that your father said about your concern for the payments other than don't build the home-- or go ahead and build the home?
A. Yes.
Q. What did he say?
A. He said to the effect, "I wish you kids would try to appreciate what we're doing for you than--I guess he thought we was acting kind of bitter towards him or something, but he made the statement--my father made that statement that day. He says,--and he turned to I and the wife and says, "I wish you would show us a little more appreciation to what we're doing--trying to do for you."

In reliance upon these conversations, Max and Joyce invested their money by improving the property rather than making their annual payments. The trial court found that the "improvements to the land that were made as a result of not making payments are substantial and have resulted in a substantial increase in the value of the land." R. at 252 L. 5-6. At one point in its decision, the trial court aptly stated that it seems "extremely unjust to the Court to allow George to instruct the Buyers not to make payments and then allow a forfeiture based upon the reliance of the Buyers in not making payments." R. at 252 L.21-23.

No annual payments, beginning with the original payment due on May 1, 1975 and ending in 1992 with the final payment, were ever

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. . .
Q. Okay. Was there anything else said that you haven't previously related or explained? . . . I would like to know how your father responded? . . .
A. My father--my father told me that I was to go ahead and build the home--the new home. That he was going to have the rest of this--try to get the rest of these affairs taken care of. That he wouldn't need these--I wouldn't be pressed to make these payments.
Q. Did he actually say you would not be pressed to make the payments?
A. No. He didn't actually say that I wouldn't be pressed to do it, but he says, "Don't worry about it." He says," Don't worry about it." He says, "go ahead and build the new home."
. . .
Q. Max, as a result of that conversation that you had with your father--did your mother say anything, by the way at that time?
A. I don't recall her ever saying.

(R. 412-419)

Based upon these conversations, Max destroyed the old home and took out a loan to build a new home on the property. The trial court found this testimony entirely credible and made findings of fact accordingly.

made due to George Fisher's instructions to Max and Joyce. Neither George nor LaRue took any action to enforce their rights under the Escrow Agreement for over 19 years even though the Escrow Agreement stated that "time was of the essence" for payment. Finally, it was not until after George's death that LaRue chose to take action.

These facts unequivocally demonstrate that George never intended that he and LaRue legally enforce the terms of the Escrow Agreement. George waived these rights for both him and his wife for over 19 years and his wife consented by her inaction to that waiver. Now, Max and Joyce will be irreparably harmed if LaRue disavows the actions made by her and her husband for the last 19 years. Accordingly, this Court should declare that George and LaRue waived their legal rights under the Escrow Agreement and deny Plaintiffs' requested relief.

B. Estoppel

The equitable doctrine of estoppel is a long recognized defense in the State of Utah and should be invoked by the trial court where a party's actions induce a detrimental course of action by another. Blackhurst v. Transamerica Insurance Co., 699 P.2d 688, 691 (Utah 1985). In order to successful estop a party from enforcing a right, the opposing party must prove three things: First, he must show a statement, admission, act, or failure to act

by one party inconsistent with a later asserted claim. Secondly, he must show the other party's reasonable action or inaction based on the first party's statement, admission, act or failure to act. And finally, injury to the second party that would result from allowing the first party to contradict or repudiate its statement, admission, act or failure to act. Cesco v. Concrete Specialist, Inc., 772 P.2d 967, 970 (Utah 1989).

George's continued refusal to first of all accept payments when tendered[6], and subsequent inaction as other payments became due, coupled with the fact that George was visiting Max and the farm continually up until the time of his death, and LaRue's absolute inaction for 19 years all constitute intentional acts which are inconsistent with the asserted claims of the Notice and the claims set forth in plaintiffs' Complaint.

Based upon such representations, Max continued to live on the farm and improve it with the monies his father told him to reinvest into the property. Such action by Max and Joyce was entirely

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[6]As discussed previously, Max and LaRue tendered $82,000 payment in 1989. At that time George told Max that he did not want the money because of tax consequences and ordered Max to reinvest the money into the property. See footnote 5 supra for Max's testimony on this subject. The trial court found this testimony credible and ordered that approximately $24,000 of the debt be set off against the total debt.

reasonable in light of George and LaRue's past statements and behavior.

To allow a forfeiture of defendants' interest in the ranch would be a terrible injustice and cause defendants substantial injury because they were not able to satisfy a demand to pay an unknown sum of money within 30 days of being served with a Notice of Termination of Agreement. Twenty years of work and improvements to the Ranch will be lost, not to mention a newly constructed home and other improvements to the property if this equitable doctrine were overlooked by this Court.

C. Laches

"The doctrine of laches may be defined generally as a rule of equity by which equitable relief is denied to one who has been guilty of unconscionable delay, as shown by surrounding facts and circumstances, in seeking that relief." 27 Am.Jur.2d Equity, § 152. Utah courts have long recognized the doctrine of laches as an equitable defense, appropriate where there is a lack of diligence by the claimant, and resulting injury to defendants. Plateau Mining v. Utah Division of State Lands, 802 P.2d 720, 731 (Utah 1990). The equitable doctrine of laches applies whether or not there are applicable statutes of limitation, and despite whether

those statutes are satisfied. American Tierra v. City of West Jordan, 840 P.2d 757, 763 (Utah 1992).

Plaintiffs demand for payment was not timely made. Paragraph (d) of Provision V found on page 3 of the Escrow Agreement states "that time is of the essence of this agreement. . . ." Yet Plaintiffs failed to act accordingly. "Ordinarily, a reasonable time is implied where the contract does not specify the time within which a demand should be made." 17 C.J.S. at 678

A demand for payment on a contract that is 19 years old and the final payment date having past is certainly not made within a reasonable time, especially given the fact that it came after George, who was the party who had previously dealt with Max, had past away.

> It has been held that the time limited for bringing an action on the contract should be treated as the time within which the demand would be made where there is nothing to indicate an expectation that demand is to be made quickly or that there is to be a delay in making it, and that, in the absence of a stipulated time within which the contract must be fulfilled, the demand may be made within the time limited by the statute for maintenance of an action for breach of the contract of for termination thereof. Id.

In Utah, the legislature has decreed that six years is ample time in which to commence an action enforcing the terms of an agreement. Utah Code Ann. § 78-12-23(2). Indeed, 19 years is over

twice as long as the longest statutes of limitations in Utah, clearly unconscionable delay.

Besides this unconscionable delay, Max and Joyce will suffer irreparable harm due to Plaintiffs' inaction. To allow plaintiffs to prevail on their claim of forfeiture would be a great inequity to Max and Joyce who have continued to live on the land, work and improve it and even with the advice, knowledge and consent of plaintiffs, went ahead and built a new home on it. The doctrine of laches is ideally suited to this case. Plaintiffs completely failed to act on any past due payments. George reassured Max on several occasions that payment was not necessary and based upon such assurances, Max and Joyce did not take the necessary action to protect their legal rights in the property. The law does not require such forceful action. The equitable doctrine of laches prevents this harsh result and should be applied in this case.

IV. THE TRIAL COURT CORRECTLY RULED THAT FORFEITURE WOULD BE INEQUITABLE AND THIS FINDING SHOULD BE UPHELD BOTH BECAUSE IT IS WELL GROUNDED IN TESTIMONY AND EVIDENCE AND AS A MATTER OF LAW.

Utah courts have long held that forfeiture is a harsh penalty and such contract provisions will be strictly construed against the one who seeks to enforce them. Moon Lake Elec. Ass'n. v. Ultrasystems W. Construction Co., 767 P.2d 125, 128 (Utah App. 1988). However, parties are usually free to contract to whatever

terms they can agree upon. Russell v. Park City Utah Corp., 548 P.2d 889, 891 (Utah 1976).

A. Notice

It has been well established in Utah that in order for a court to order forfeiture the seller must strictly abide by the procedures set forth in the written contract.[7] First Security Bank v. Maxwell, 659 P.2d 1078, 1080 (Utah 1983). Under the terms of

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[7]The Escrow Agreement provides that:

> In the event the Sellers desire to terminate this agreement in accordance with the forfeiture provisions contained herein, the Sellers shall deliver to the escrow holder a written notice stating the payments which are delinquent and the covenants with which the Buyers have failed to comply and that this agreement will be terminated by them, the Sellers, unless said delinquent payments are paid or the covenants complied with by the Buyers within thirty (30) days from the date such notice is delivered to the escrow holder. At its option the escrow holder may mail a copy of said notice by registered mail to the Buyers. If such delinquent payments are not paid and such conditions complied with by the Buyers within such period of thirty (30) days, the escrow holder shall thereafter immediately deliver such documents as are held by the escrow agent to the Sellers; provided, however, that if the Buyers before the expiration of said period of thirty (30) days, deliver to the escrow holder written notice that they object to the termination of the agreement and to the escrow holder delivering said documents to the Sellers for any reason, the escrow holder shall then at its convenience, deliver to the Sellers a copy of such notice, or at its option mail a copy of such notice by registered mail to the Sellers, and thereafter the escrow holder shall withhold delivery of said documents until such time as both the Buyers and Sellers shall direct it in writing what disposition to make thereof, and if no directions are so received by the escrow holder, it may withhold delivery until its duties and the rights of the parties with respect thereto, have been judicially determined. However, if the Buyers serve no written objection to the delivery of said documents by the escrow holder to the sellers within the said period of thirty (30) days, the escrow holder shall immediately deliver such documents to the Sellers without further liability, duty, or obligation therefor or in connection therewith, to the Buyers.

See Addendum A.

the Escrow Agreement in this case, Plaintiffs are required to notify the escrow agent of the exact breach and also to notify the Max and Joyce that they are intending to terminate the agreement. Throughout the course of these proceedings, absolutely no evidence was presented that Plaintiffs ever attempted to notify the escrow holder of the exact breach. Under the strict compliance rules for forfeiture, Plaintiffs have failed to either allege or prove their compliance with the explicit terms of the Escrow Agreement therefore, forfeiture cannot be granted.

Furthermore, in the present case, the trial court found that Max and Joyce had not been making the annual payments due to the request of their father. The court indicated that at the time the Notice of Termination of Agreement was sent to Max and Joyce, they had been acting in reliance upon George's representations and that no payment was due until the following May 1, payment date. Therefore, the notice was prior to any actual default and thus defective.

The notice was also defective because it failed to specify the amount that Plaintiffs believed would be necessary to remedy the breach. In First Security Bank, the Utah Supreme Court held that if there is any ambiguity or lack of clarity in the notice, that it would be deemed to be defective and forfeiture would not be

granted. Indeed, the Court specifically stated, "we think forfeiture should be refused when the notice was given to the delinquent buyers is indefinite or uncertain as to the amount he is to pay or the performance demanded of him." 659 P.2d at 1080, (citations omitted.)

Careful review of Plaintiffs' Notice of Termination of Agreement reveals that Max and Joyce were never notified what amount Plaintiffs' considered necessary to cure the alleged breach. Therefore, once again forfeiture should be denied.

B. Conscienability of Forfeiture Enforcement

Not only should this forfeiture clause not be enforced because of the defective notice, but Utah law has consistently held that a contract should be enforced according to its terms, unless that result is so unconscionable that a court of equity will refuse to enforce it. Bellon, 808 P.2d at 1096. The Utah Supreme Court has held that it will enforce a forfeiture clause, unless they "find that the forfeiture would be so grossly excessive relation to any realistic view of loss that might have been contemplated by the parties that it would so shock the conscience." Id. An examination of Utah case law shows that this court will enforce the forfeiture clause when the amount of forfeiture does not greatly exceed, or is less than, the amount of damages. Id.

Infact, the Utah Supreme Court, when addressing the forfeiture clause of a contract for real property stated:

> It will be observed that in all cases where the stipulation for liquidated damages was enforced it bore some reasonable relation to the actual damages which could reasonably be anticipated at the time the contract was made and was not a forfeiture which would allow an unconscionable and exorbitant recovery.

Perkins v. Spencer, 243 P.2d 446, 449 (Utah 1952).

The forfeiture clause in this contract is a stipulation for liquidated damages as discussed in Perkins. Here, the trial court properly found that

> As previously indicated, based upon the statement of George that payments would not be expected, a home was built upon the property which is free of any encumbrance to the land. Other buildings were built, sprinkling systems were installed, the land was cleared and graded, ponds were constructed and expanded, and the property was improved. The Court finds that the property has been substantially improved as a direct result of the monies which would have otherwise been made toward the contracts being invested in the property. The defendants relied upon the fact that payments would not be required until they were requested in their decision to invest payment monies into improvements. The parties had agreed to defer payments, Therefore, the defendants were not in default under the terms of the contract as modified when notice was sent in March of 1993. Under these circumstances, even if the contract was breached, it would be inequitable for the Sellers to allow and encourage payments to be invested in the property and then use the failure to pay as a basis for breach of contract. R. at 257 L. 12-14. (emphasis added).[8] This

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[8]The Escrow Agreement provides that:

> In the event of a failure to comply with the terms [of the Escrow Agreement] . . . Sellers may, at their option, re-enter and take

finding of fact remains unchallenged. Plaintiffs have failed to provide any facts that would dispute the courts finding that it would be inequitable to order forfeiture. Therefore, this Court must uphold the trial court's decision and refuse to order forfeiture.

C. Plaintiffs Have Failed to Marshall the Evidence to Demonstrate How Trial Court's Finding that Forfeiture is Inequitable is Clearly in Error

Plaintiffs' brief focuses entirely upon the equities involved in their requested forfeiture. At no time did they attempt to marshall the evidence necessary to overturn a trial court's equitable finding. The Utah Supreme Court has held that a trial court's finding that it would be inequitable to forfeit real property under a contract must be afforded the same standard of review as a court's factual finding. Bellon v. Malnar, 808 P.2d at 1096; Bountiful v. Riley 784 P.2d at 1175; Ashton v. Ashton, 793

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possession of said premises without legal process as in its first and former estate, together will all improvements and additions made by the Buyers thereon, and said additions and improvements shall remain with the land and become the property of Sellers, the Buyers becoming at once a tenant at will of the Sellers. The evidence also supports this conclusion.

Therefore, under this contract clause, Plaintiffs would recover the property with the substantial improvements and subsequent increase in property value without any encumbrance on the properties title. At the same time, Defendants would still be liable for the loans they took out to improve the property. Thus Plaintiffs would in effect recover both the property and all monies due under the Escrow Agreement.

P.2d at 150 n.1. Therefore, a finding of this nature will only be overturned if it is clearly erroneous. Id. Plaintiffs have failed to provide any attempt to marshall the evidence to show that the trial court reached this finding in clear error. Under this rule of appellate scrutiny, this court should assume that the trial court's finding was correct and refuse to address the issue.

V. PLAINTIFFS HAVE FAILED TO PROPERLY MARSHALLED THE EVIDENCE TO SHOW CLEAR ERROR ON THE FACTUAL ISSUES THEY WISH TO APPEAL

A trial court's factual finding will only be overturned if it is clear error. Bountiful, 784 P.2d at 1175. Therefore, the party seeking to have the finding overturned has the burden of marshalling all the evidence to show that there is no foundation for the trial court's finding. Slattery, 857 P.2d at 249. If appellant fails to properly marshal the evidence, appellate courts must assume the findings are correct. Alta Indus. Ltd. v. Hurst, 846 P.2d 1282, 1286 (Utah 1993).

Once the evidence is listed or marshaled with appropriate citation to the record, the appellant must then demonstrate that the marshaled evidence is legally insufficient to support the findings when viewing the evidence and inferences in a light most favorable to the decision. Stewart v. Board of Review, 831 P.2d 134, 138 (Utah 1992); McPherson v. Belnap, 830 P.2d 302, 305 (Utah

App. 1992). If the appellant fails to do so, the disputed issue should be disregarded. Id.

A. LaRue Fisher is bound by the actions of her husband.

The trial court found that based upon the testimony off all parties, LaRue allowed her husband to be spokesman for them in their dealings with Max. The court specifically found:

> [LaRue] knew that others viewed George as their spokesman when it came to business matters. And she allowed this to occur even when she was in disagreement as to the decision which had been reached. It is very apparent that George didn't want trouble between he and his son, and LaRue didn't want trouble between her and her husband. So she didn't take any action and neither did they. Under these circumstances, the Court believes that LaRue is also bound by the representations of George with respect to the payments. The Court also believes that LaRue knew that George had authorized some kind of delay in the payments.

R. at 255 L. 7-12. The testimony supports this finding. Although many people testified that they knew LaRue was not happy about the arrangement between her husband and Max, no one (except LaRue) could testify that she had ever asked Max for the payments until after her husband's death. Infact, the trial court chose to discredit LaRue's testimony and found that "the Court relies upon the testimony of Max that his mother first asked for payment about a year after his father died. R. at 254 L. 1-2. See also R. 522 L. 12-25.

In a thorough examination of the record, the trial court's finding on this issue is well grounded in testimony and evidence. There is no showing that the facts relied upon by the trial court are legally insufficient to support such a finding. As a result, this court should disregard this portion of plaintiffs' argument and uphold the trial court's finding that LaRue Fisher's actions have bound her to the decisions made by her husband.

Furthermore, Plaintiffs seek to not only have the trial court's finding that LaRue Fisher was bound by the actions of George Fisher, Jr. overturned but also Plaintiffs are arguing that the trial court erred when it found that LaRue first asked for payments about a year after George's death. R. at 254 L. 1-2. At no point do plaintiffs attempt to marshall the evidence to show this finding was in error. Furthermore, they do not, and cannot, show how the evidence supporting this finding was legally insufficient. Therefore this issue should also be disregarded and the trial court's finding upheld.

B. The proceeds from the Cattle sale in 1979 were properly credited to an Escrow payment

The trial court found that:

> Max and Joyce have each testified that the 26 head of cattle were their cattle. . . . As between the two parties [Max and Joyce's testimony versus LaRue's], the recollection of LaRue is not as good as Max's. LaRue simply was not involved in the

daily operation of the dairy and did not have a clear recollection concerning these issues. Based upon all the evidence, the court finds that the cattle which were sold in 1979 were owned by Max and Joyce, therefore, the amount due under the contract should be reduced by the amount of $24,980.

R. at 258 L. 2-4. Furthermore, this finding is supported through the testimony of Max Fisher. See Footnote 3 Supra. Plaintiffs have first of all failed to marshall all the evidence, and secondly, demonstrate how the evidence is legally insufficient to support a finding that the trial judge was clearly erroneous in making this finding. Therefore, this finding of the trial court should be sustained.

VI. IN FINDING THAT THE CONTRACT HAD BEEN MODIFIED, THE TRIAL COURT ERRED BY CONCLUDING THAT INTEREST CONTINUED TO ACCRUE ON THE CONTRACT PRINCIPLE WHEN ALL THE EVIDENCE INDICATED THAT CONTINUED ACCRUAL WAS NEVER CONTEMPLATED BY THE PARTIES, GEORGE FISHER DID NOT EXPECT INTEREST TO ACCRUE AND THE PAYMENTS WERE WAIVED BY BOTH GEORGE AND LARUE FISHER.

In its decision, the trial court found that "the purchasers owe the entire sum under the contract plus interest less the down payment and the amount received for cattle ($24,980)." This finding not only goes against the entirety of the evidence, but it is legally incorrect.

A. No Evidence Supports Trial Court's Factual Finding That the Parties Agreed To Pay Interest.

As stated in the statement of facts in this brief, the only testimony regarding whether interest would continue to accrue on

any payments that were not waived by George, was the testimony of James J. Oman. Mr. Oman testified that in a conversation between himself, George and LaRue he heard George state on two occasions that "'I don't think we should charge interest on [the payments].'" R. at 526 L. 17. Cross-Appellants have been unable to find any other testimony or evidence presented to the trial court on this issue.

As a matter of law, this evidence is totally insufficient to substantiate the trial court's finding that the parties agreed on continued accrual of interest. Therefore, this finding should be overturned.

B. George Fisher Waived Continued Accrual of Interest

Not only is this finding clearly erroneous but its result is totally inequitable as George Fisher waived his rights to collect interest under the Escrow Agreement. As discussed in point III of this brief, waiver is the intentional relinquishment of a known right. To determine whether a party intentionally relinquished a right, the court should look to the totality of the circumstances. In this case, George Fisher's only expressed desire on the issue of waiver was his assertion that he did not believe that he and his wife should waive the collection of interest. R. 526 L. 17. Although there was testimony that LaRue did not agree on this

issue, the trial court found that her inaction and acquiescence to her husbands desires in issues of business bound her to his actions. R. 255 L. 7-12. Under these circumstances, and the other circumstances discussed in this brief, it would be inequitable for this court to order accrued interest on the Escrow Agreement. In effect, if would allow a party to refuse to accept payment for 19 years so they could collect the accrued interest from the account. This result is ludicrous and should be avoided. Plaintiffs should not be granted accrued interest.

VI. THIS COURT SHOULD GRANT DEFENDANT ATTORNEYS FEES IN THIS ACTION.

As discussed throughout this brief, Max and Joyce Fisher have relied upon the representations of their father that they need not make the payments under the Escrow Agreement. Based upon these representations, they took actions which, if this Court grants Plaintiff's requested relief, will result in great detriment to them. Max and Joyce have incurred great expenses in the defense of this action. Should Defendants prevail on the issues presented in this brief, they should be granted attorneys fees in compliance with the Escrow Agreement.[9]

[9]The Escrow Agreement provides that a party prevailing on any action resulting from rights and privileges under the agreement may recover a reasonable attorneys fee.

CONCLUSION

The trial court's ruling that this contract for the sale of real property was in error. First, this ruling is contrary to the Statue of Frauds. And secondly, all the parties failed to come to a meeting of the minds about essential terms of the oral modification. Absent the finding of an oral modification, Plaintiffs are only entitled to the protections granted to them by law and under the Escrow Agreement. Based upon their failure to pursue this action for over 19 years, they are barred by the statute of limitation and the equitable doctrines of waiver, estoppel and laches. Moreover, plaintiffs have failed to marshall all the evidence to demonstrate that the trial court's factual finding that LaRue Fisher is bound by the actions of her husband, and that the monies from the sale of cattle in 1979 were accepted as payment on the property, was clearly in error. Finally, Plaintiffs requested forfeiture should not be granted due to Plaintiffs' failure to follow the procedures provided for such proceedings in the Escrow Agreement and the extreme inequities that would result from such forfeiture. Therefore, this Court should deny Plaintiffs requested relief and grant Defendant quieted title in the subject property.

Respectfully submitted this 4 day of ~~March~~ April, 1995.

Lohra L. Miller
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that two true and accurate copies of the foregoing BRIEF OF APPELLEES AND CROSS-APPELLANTS were mailed this 4 day of ~~March~~ April, 1995, to:

Richard L. Bird, Jr.
Lon Rodney Kump
Richards, Bird & Kump, a P.C.
333 East Fourth South
Salt Lake City, Utah 84111-2988

ADDENDA

ADDENDUM "A"

EXHIBIT A

ESCROW AGREEMENT

THIS AGREEMENT made and entered into this 1st day of May, 1974, by and between GEORGE FISHER, JR., and LaRUE FISHER, of Altonah, Duchesne County, State of Utah, hereinafter called the Sellers, Parties of the First Part, and MAX GEORGE FISHER and JOYCE FISHER, of Altonah, Duchesne County, State of Utah, hereinafter called the Buyers, Parties of the Second Part.

W I T N E S S E T H :

That the Sellers, in consideration of the money paid and to be paid, and the promises and covenants herein expressed to be performed by the Buyers, hereby agree to sell and convey to the Buyers for the price and upon the terms and conditions herein stipulated; and the Buyers hereby promise and agree to purchase for said price and upon said terms and conditions herein specified, those certain tracts of land with the improvements thereon and appurtenances thereto. All of said property being situated in Duchesne County, State of Utah, and being more particularly described as follows, to-wit:

SE 1/4; Section 6, Township 1 South, Range 3 West, U.S.M.

S 1/2 SW 1/4; Section 6, Township 1 South, Range 3 West, U.S.M.

N 1/2 NE 1/4, SW 1/4 NE 1/4, NW 1/4; Section 7, Township 1 South, Range 3 West, U.S.M.

SW 1/4 NE 1/4; NW 1/4 NE 1/4; Section 12, Township 1 South, Range 4 West, U.S.M.

Together with all improvements, appurtenances and water rights, which include a filing on a spring in the office of the Utah State Engineer and 228 shares of stock in the Dry Gulch Irrigation Company, Classes A and B, thereunto belonging.

Excepting and reserving therefrom all oil, gas and other minerals.

Grantors reserve the fishing rights in the two lower ponds on said property during the term of this agreement.

The Buyers covenant and agree that they will pay to the Sellers for the said property hereunder sold the total sum of One Hundred Twenty-Four Thousand Dollars ($124,000.00), to be paid as follows, to-wit: Eight Thousand Two Hundred Eighty Dollars ($8,280.00) at the time of the signing of this agreement, the receipt of which is hereby acknowledged, and the unpaid balance of One Hundred Fifteen Thousand Seven Hundred Twenty Dollars ($115,720.00) to be paid Ten Thousand Dollars ($10,000.00) on the 1st day of May, 1975 and a like and equal sum on the 1st day of each May thereafter until the full balance of the purchase price has been paid in full. Said payments, which include interest at the rate of five percent (5%) per annum, will be applied first to interest and then to principal.

The parties hereto do hereby further covenant and agree to the following provisions of this contract.

PROVISION I

At the option of the Buyers, any part, or all, of the installments hereinabove provided to be paid, may be accelerated or paid in advance at any time.

PROVISION II

It is further agreed between the Sellers and the Buyers, that the Sellers shall pay all taxes due and payable for all years prior to January 1, 1974 and after said date Buyers shall be responsible for payment of said taxes, and to pay all other taxes and assessments of every kind and nature assessed subsequent to January 1, 1974, during the life of this contract.

PROVISION III

That upon the execution of this contract the Sellers covenant and agree to make and execute a warranty deed, conveying a good and marketable title to the above described land. Said deed and/or other instruments of conveyance, together with evidence of title covering the real property described above or at the option of Sellers a policy of title insurance to be delivered to and held by the escrow holder to be hereinbelow named.

PROVISION IV

It is further agreed by the Buyers, that they will at all times keep the improvements on said property insured against fire in a reputable insurance company for an amount to at least Twenty Thousand Dollars ($20,000.00). The escrow holder shall not be the judge as to the sufficiency of any insurance held under the terms of this contract, but all policies of insurance shall be delivered to and be held by the escrow holder during the term of said escrow.

PROVISION V

It is mutually understood and agreed that the First Security Bank of Utah, at its Roosevelt, Utah, office shall act as escrow holder of all documents appurtenant to or used in connection with this agreement until all amounts due hereunder are paid in full upon the following terms and conditions, to-wit

(a) Upon the execution hereof, the original of this agreement together with warranty deed, and water certificates shall be delivered to said First Security Bank of Utah, N.A., escrow holder, to be held in escrow and delivered to the Buyers upon the payment of all amounts due hereunder, or in the event of default, returned to the Sellers in accordance with the provisions hereinafter contained.

(b) The Sellers and Buyers shall each pay one-half of the escrow fee charged by the escrow holder.

(c) The Sellers shall deliver immediate possession of said property sold hereunder to the Buyers and Buyers shall be entitled to keep possession of the above described property only so long as they keep and perform the covenants and conditions herein contained on their part to be kept and performed. In case the Buyers shall fail to make the payments aforesaid, or any of them punctually, and upon the strict terms and at the times limited, time of payment being of the essence of this agreement, or if they, the Buyers, shall breach any other covenant herein contained, then the Sellers, may, at their option, declare this agreement terminated and canceled by serving upon the Buyers a thirty (30) days written notice of their intention so to do, and

Provided, that if the Buyers shall fail to make the payments due or fail to comply with any other covenants, within the period herein provided for in such notice, then all rights and interests of the Buyers shall thereupon terminate without further demand or notice, it being understood and agreed that the serving of such notice be complete upon the date of depositing the same by registered mail, with postage prepaid, in any United States Post Office within the State of Utah, and addressed to Buyers at the address they file with the escrow holder, and upon the termination of this contract, as herein provided, and subject to all statutory penalties and procedure therefor, and particularly shall become subject to the statutory action for unlawful detainer in the event possession of said premises and property are not delivered over to the Sellers, or their successors in interest, upon demand.

In the event of a failure to comply with the terms hereof by the Buyers, or upon failure to make any payments when the same shall become due, or within thirty (30) days thereafter, the Sellers shall, at their option, be released from all obligations in law and equity to convey said property and all payments which have been made theretofore on the contract by the Buyers, shall be forfeited to the Sellers as liquidated damages for the non-performance of the contract, and the Buyers agree that the Sellers may, at their option, re-enter and take possession of said premises without legal process as in its first and former estate, together with all improvements and additions made by the Buyers thereon, and the said additions and improvements shall remain with the land and become the property of the Sellers, the Buyers becoming at once a tenant at will of the Sellers. It is agreed that time is the essence of this agreement.

In the event there are any liens or encumbrances against said premises other than those herein provided for or referred to, or in the event any liens or encumbrances other than herein provided for shall hereafter accrue against the same by acts or neglect of the Sellers, then the Buyers may at their option, pay and discharge the same and receive credit on the amount then remaining due hereunder in the amount of any such payment or payments and thereafter the payments herein provided to be made, may at the option of Buyers, be suspended until such a time as such suspended payments shall equal any sums advanced as aforesaid.

It is herein mutually understood and agreed by and between the parties hereto, that if either party shall fail or neglect to perform any of the covenants and stipulations herein contained to be performed on his part, and if any suit or action is brought to enforce any of the covenants herein contained, the defaulting party shall pay all costs and expenses of such action, including a reasonable attorney's fee.

(d) That time is the essence of this agreement and if the Sellers accept payment from the Buyers less than according to the terms herein mentioned, then by so doing, it will not, in any way alter the terms of the agreement as to the forfeiture herein contained.

(e) In the event the Sellers desire to terminate this agreement in accordance with the forfeiture provisions contained herein, the Sellers shall deliver to the escrow holder a written notice stating the payments which are delinquent and the covenants with which the Buyers have failed to comply and that this agreement will be terminated by them, the Sellers, unless said delinquent payments are paid or the covenants complied with by the Buyers within thirty (30) days from the date such notice is delivered to the escrow

holder. At its option the escrow holder may mail a copy of said notice by registered mail to the Buyers. If such delinquent payments are not paid and such conditions complied with by the Buyers within such period of thirty (30) days, the escrow holder shall thereafter immediately deliver such documents as are held by the escrow agent to the Sellers, provided, however, that if the Buyers before the expiration of said period of thirty (30) days, deliver to the escrow holder written notice that they object to the termination of the agreement and to the escrow holder delivering said documents to the Sellers for any reason, the escrow holder shall then at its convenience, deliver to the Sellers a copy of such notice, or at its option mail a copy of such notice by registered mail to the Sellers, and thereafter the escrow holder shall withhold delivery of said documents until such time as both the Buyers and Sellers shall direct it in writing what disposition to make thereof, and if no directions are so received by the escrow holder, it may withhold delivery until its duties and the rights of the parties with respect thereto, have been judicially determined. However, if the Buyers serve no written objection to the delivery of said documents by the escrow holder to the Sellers within the said period of thirty (30) days, the escrow holder shall immediately deliver such documents to the Sellers without any further liability, duty, or obligation therefor or in connection therewith, to the Buyers. The parties executing this agreement shall show their respective addresses and such address may be used by the escrow holder in giving any notice required by the terms hereof or for any other purpose hereunder until the parties give said escrow holder notice in writing of a change of address and thereafter such new address shall be used by the escrow holder.

It is mutually agreed between the parties hereto that the only obligation imposed upon the escrow agent is to hold the papers in connection herewith and to receive the payments made under the terms of this agreement. The said escrow agent shall not be liable or obligated to send any notice of non-payment or of forfeiture or of non-compliance with the terms of this contract. The escrow agent may, upon demand of the Sellers, in the event of default in payment by the Buyers as herein contemplated, and after thirty (30) days after said default, return the papers to said Sellers and cancel this agreement as it pertains to said escrow agreement. The failure of the parties hereto to deposit the proper papers as herein provided for shall not render to escrow holder liable for the same, and the escrow holder is under no obligation to examine or determine the marketability of title, efficacy, genuiness or value of any documents herein placed with the escrow holder to be held by it.

(f) That the terms of this agreement shall be binding upon the heirs, personal representatives, successors and assigns of the parties hereto.

IN WITNESS WHEREOF, said parties have executed this agreement in triplicate the day and year first above written.

Max George Fisher

Max George Fisher

George Fisher Jr.

George Fisher, Jr.

Joyce Fisher

Joyce Fisher

LaRue Fisher

LaRue Fisher

BUYERS

SELLERS

STATE OF UTAH)
ss.
County of Duchesne)

On this 1st day of May, 1974, personally appeared before me GEORGE FISHER, JR , and LaRUE FISHER, Sellers, and MAX GEORGE FISHER and JOYCE FISHER, Buyers, the signers of the above and foregoing Escrow Agreement, who duly acknowledged to me that they signed and executed the same.

Notary Public

Residing at Roosevelt, Utah

My Commission Expires.
1-27-78

ADDENDUM "B"

EXHIBIT B

NOTICE OF TERMINATION OF AGREEMENT

VIA REGISTERED MAIL

TO: Max George Fisher and
Joyce Fisher
Box 267
Altamont, Utah 84001

Re: Escrow Agreement dated May 1, 1974 by and between George Fisher, Jr. and LaRue Fisher as Sellers and Max George Fisher and Joyce Fisher as Buyers

Dear Max George Fisher and Joyce Fisher:

YOU ARE HEREBY NOTIFIED that in accordance with Provision V, paragraph (c) of the Escrow Agreement entered into the 1st day of May, 1974 between George Fisher, Jr. and LaRue Fisher as Sellers and yourselves as Buyers, the undersigned LaRue Fisher as one of the Sellers and Brent Fisher and LaRue Fisher, Trustees of the George Fisher, Jr. Family Inter Vivos Revocable Trust Agreement (hereinafter "Sellers"), intend to terminate and cancel the Escrow Agreement because of your failure to make payments due to the Sellers in accordance with the Agreement, unless you make all principal payments and interest due under the Agreement within thirty (30) days following the deposit of this Notice in the United States Registered Mail addressed to you.

If you fail to make payment to the undersigned of all principal and interest due under the Agreement within this thirty (30) day period, then all right and interest of you as Buyers shall thereupon terminate without further demand or notice.

YOU ARE FURTHER NOTIFIED that in the event you do not make payment of all amounts due under said Escrow Agreement within said thirty (30) day period, you will then become subject to the statutory action for unlawful detainer in the event possession of said premises and property are not delivered over to the Sellers upon demand. This is in accordance with the second paragraph contained in Provision V, paragraph (c) of said Escrow Agreement.

YOU ARE FURTHER NOTIFIED that in the event you do not make the payment due within said thirty (30) days, the Sellers intend to be released from all obligations in law and equity to convey said property and all payments which have been made theretofore on the contract by you shall be forfeited to the Sellers as liquidated damages for the non-performance of the contract. This is in accordance with the third paragraph contained in Provision V, paragraph (c) of said Escrow Agreement.

YOU ARE FURTHER NOTIFIED that in the event you fail to make the payments due within said thirty (30) days, Sellers intend to take possession of said premises without legal process, together with all improvements and additions made by you. The additions and improvements remain with the land and will thereby become property of the Sellers in accordance with the third paragraph in Provision V, paragraph (c) of the Escrow Agreement.

YOU ARE FURTHER NOTIFIED that if you fail to make the payments due within said thirty (30) days, you become at once a tenant at will of Sellers and if it is necessary to commence legal action to eject you from the property in accordance with the unlawful detainer statutes of the State of Utah, the undersigned will seek an award of all costs and expenses of any legal action, including a reasonable attorney's fee, in accordance with the last full paragraph in Provision V, paragraph (c) of the Escrow Agreement.

DATED this 5th day of March, 1993.

LaRue Fisher

LaRUE FISHER

THE GEORGE FISHER, JR. FAMILY INTER VIVOS REVOCABLE TRUST

By: Brent Fisher Trustee

BRENT FISHER, Trustee

By: LaRue Fisher Trustee

LaRUE FISHER, Trustee

cc: Paul J. Barton, Esquire
Ronald E. Kunz, Esquire

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ADDENDUM "C"

MR. KUNZ: YOUR HONOR, AT THE TIME I INDICATED THAT SINCE IT WASN'T AN ORIGINAL I DIDN'T OBJECT JUST BASED UPON MY DESIRE TO REVIEW IT. I HAVEN'T HAD TIME TO REVIEW IT, BUT I DON'T THINK THERE'S ANY PROBLEM THERE AS I'VE LOOKED OVER IT. I WAS JUST A BIT--

THE COURT: WHY DON'T I, SO THAT HE CAN REST, ACCEPT THAT, SUBJECT TO YOUR--AN ISSUE AS TO WHETHER OR NOT THAT IT'S INDEED A PHOTOGRAPHIC--AND YOU'LL HAVE TO BRING THAT BEFORE THE COURT.

SUBJECT TO THAT LATITUDE, EXHIBIT NUMBER 1 WILL BE RECEIVED.

MAX GEORGE FISHER,

CALLED AS A WITNESS BY AND ON BEHALF OF THE DEFENDANTS IN THIS MATTER, AFTER HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. KUNZ:

Q MAX, WOULD YOU PLEASE STATE YOUR FULL NAME AND PRESENT ADDRESS.

A MAX GEORGE FISHER AND MY ADDRESS IS BOX 267, ALTAMONT, UTAH, ZIP 84001.

Q AND WHERE DO YOU RESIDE?

A I RESIDE IN THE OLD TOWN THEY CALLED ALTONAH. CLAY

BASIN. THE HEAD OF CLAY BASIN.

Q NOW, MAX, YOU HAVE HEARD TESTIMONY AS TO THE VARIOUS EXHIBITS HAVE COME IN REGARDING YOUR AGREEMENT TO PURCHASE 600 ACRES FROM YOUR PARENTS; IS THAT CORRECT?

A THAT'S CORRECT.

Q AND IS THERE ANYTHING DIFFERENT ABOUT THE WAY YOU WENT ABOUT BUYING THIS HOME FROM YOUR PARENTS THAT WAS REPRESENTED BY YOUR MOTHER THAT YOU WOULD LIKE TO EXPLAIN AT THIS TIME IN REGARD TO WHO DRAFTED THE AGREEMENT OR WHETHER OR NOT YOU SIGNED IT AND ALL THOSE THINGS.

A THE WAY THAT THE PROPERTY--THE TRANSACTION TOOK PLACE WAS WITH ME AND MY FATHER AND THE ATTORNEY DILLMAN WAS THE MAN THAT DRAWED UP THE ESCROW, OR THIS AGREEMENT. AND HE DID RESIDE IN ROOSEVELT, HAD HIS OFFICE IN ROOSEVELT. AND THERE WAS NOBODY PRESENT THERE BUT I AND MY FATHER AND THE ATTORNEY AND THEN THE SECRETARY HE HAD THEN BILLIE.

Q OKAY. BUT YOU ACKNOWLEDGE, DO YOU NOT, MAX, THAT DOCUMENTS ENTITLED EXHIBIT 1, ESCROW AGREEMENT, THAT'S BEEN RECEIVED BY THE COURT, IS A REPRESENTATION OF THE AGREEMENT; IS THAT TRUE?

A I DO.

Q AND ISN'T IT ALSO NOT TRUE THAT THIS AGREEMENT SETS FORTH AN OBLIGATION THAT YOU AND YOUR WIFE UNDERTOOK WHEREBY YOU WERE EXPECTED TO PAY THE SUM OF $10,000 ON AN ANNUAL BASIS UNTIL SUCH PURCHASE PRICE, PLUS FIVE PERCENT INTEREST, WAS

PAID.

MR. BIRD: WELL, LET'S NOT HAVE YOU LEADING YOUR WITNESS. YOU OBJECTED TO MY QUESTIONS AND I SUGGEST YOU OBSERVE THE SAME REQUIREMENT.

THE COURT: TO THE EXTENT THAT'S AN OBJECTION, I'LL SUSTAIN.

MR. BIRD: I WON'T OBJECT TO THAT ONE, BUT I WILL THE NEXT ONE.

THE COURT: OKAY.

Q (BY MR. KUNZ) NOW, MAX, DO YOU RECALL WHAT YEAR THAT TOOK PLACE?

A THAT THIS AGREEMENT WAS WRITTEN UP?

Q YES.

A I RECALL IT WAS '75.

Q I'M GOING TO SHOW YOU A COPY OF THE EXHIBIT AND SEE IF THAT REFRESHES YOUR MEMORY.

A IT SAYS THE FIRST DAY OF MAY, 1974, SO THAT WOULD BE CORRECT. I'M WRONG.

Q SO WOULD THIS DOCUMENT THEN BE MORE ACCURATE THAN YOUR MEMORY IN THAT REGARD?

A YES, IT WOULD.

Q MAX, WHAT WAS YOUR UNDERSTANDING AT THE TIME YOU ENTERED INTO THE AGREEMENT AS TO WHEN YOUR FIRST PAYMENT WOULD BE DUE?

MR. BIRD: I OBJECT TO THAT AS IMMATERIAL AND

OBJECTIONABLE. THE AGREEMENT SPEAKS FOR ITSELF.

MR. KUNZ: WELL, I COULDN'T LEAD HIM WITH THE AGREEMENT SO I WAS ASKING THAT QUESTION, YOUR HONOR.

THE COURT: ARE YOU GETTING AT SOMETHING DIFFERENT?

MR. KUNZ: NO, NO, I'M NOT.

THE COURT: I'M GOING TO OVERRULE THE OBJECTION TO THE EXTENT OF HIS UNDERSTANDING THAT THE AGREEMENT WILL SPEAK FOR ITSELF AS TO THE CONTENTS AND THE OBLIGATIONS BETWEEN THE PARTIES. HE CAN NOT, HOWEVER, TESTIFY AS TO WHAT HIS UNDERSTANDING OF THE AGREEMENT WAS. THAT IS NOT TESTIMONY AS TO WHAT THE AGREEMENT IN FACT IS. IF YOU UNDERSTAND THE DISTINCTION I'M MAKING. HE'S NOT TESTIFYING AS TO WHAT THE AGREEMENT, ONLY WHAT HIS UNDERSTANDING IS.

YOU MAY RESPOND.

THE WITNESS: YOU'LL HAVE TO--

Q (BY MR. KUNZ) MAX, THE AGREEMENT PROVIDES THAT THE FIRST PAYMENT WAS TO BE PAID ON THE FIRST DAY OF MAY OF 1975. DID YOU MAKE THAT PAYMENT?

A NO.

Q DID YOU ATTEMPT TO PAY YOUR FATHER THAT PAYMENT?

A IN--YES.

MR. BIRD: WELL, NOW, JUST A MINUTE. I OBJECT TO THAT QUESTION AS LEADING AND SUGGESTIVE. "DID YOU ATTEMPT TO PAY" IT? I SAY THAT'S A LEADING AND SUGGESTIVE AND ARGUMENTATIVE QUESTION.

THE COURT: OVERRULED. IT DOESN'T SUGGEST WHETHER OR NOT HE DID.

Q (BY MR. KUNZ) AND WHAT WAS YOUR ANSWER TO THE QUESTION, MAX?

A I SAID YES.

Q OKAY. AND COULD YOU DESCRIBE THAT ATTEMPT?

A HOW FAR IN DETAIL DO YOU WANT ME TO GO?

Q VERY MUCH.

A VERY MUCH SO?

Q YES.

A I WAS IN THE BOTTOM OF MY FIELD--

Q OKAY. FIRST OF ALL, WHEN DID THIS OCCUR? WHEN DID YOU MAKE THE ATTEMPT TO PAY?

A THAT WOULD'VE BEEN IN THE SUMMER, THE SPRING OF '74. IT WOULD'VE BEEN ABOUT MAY, APRIL. I DON'T KNOW THE DATES, BUT IT WAS IN TOWARDS THE SPRING, IT WASN'T INTO THE SUMMER, BUT IT WAS INTO THE SPRING.

Q OKAY.

MR. BIRD: JUST A MINUTE. I OBJECT TO THE QUESTION ON THE GROUND THAT THE PLAINTIFF LARUE HANSEN IS NOT SHOWN TO HAVE BEEN PRESENT. CONVERSATIONS WITH GEORGE FISHER ALONE ARE NOT ADMISSIBLE BECAUSE OF THE STATUTE OF FRAUDS AND BECAUSE OF HEARSAY. IT'S NOT RELIABLE TESTIMONY AND SHOULD NOT BE RECEIVED.

MR. KUNZ: YOUR HONOR, THIS IS CERTAINLY NOT A

QUESTION THAT FALLS WITHIN THE STATUTE OF FRAUDS. FIRST OF ALL, I HAVEN'T EVEN COVERED WITH MAX YET THE FACT WHO WAS PRESENT AT THE TIME SUCH AN ATTEMPT WAS MADE. AND FURTHERMORE, HE CERTAINLY DOES HAVE A RIGHT TO TALK ABOUT ANY CONVERSATIONS THAT HE HAD WITH ONE OF THE PARTIES TO THE CONTRACT.

THE COURT: ARE YOU GOING TO THE ISSUE OF WHETHER A DEBT WAS FORGIVEN?

MR. KUNZ: WELL, YES, I AM.

THE COURT: OR WHETHER OR NOT A PAYMENT WAS FORGIVEN.

OKAY. THE COURT WILL RULE THIS ISSUE--MAYBE YOU WOULD LIKE TO, MR. BIRD, EXPLAIN TO ME WHAT THE STATUTE OF FRAUD ISSUE IS HERE.

MR. BIRD: YES. THE PARTIES--THERE WERE TWO PARTIES TO THE AGREEMENT. NOW, THIS CONVERSATION IN MAY--I DON'T KNOW WHETHER IT TOOK PLACE IN MAY OF '75 OR AFTER OCTOBER 10TH, 1975 WHEN THE ESCROW AGREEMENT HAD BEEN MADE, BUT IN EITHER EVENT THERE WERE TWO PARTIES TO THE TRANSACTION, A HUSBAND AND WIFE. AND THE FIRST CASE WE'VE GIVEN YOU OF ZUNIAN INVOLVED HUSBAND AND WIFE AND IT HELD THAT THE REPRESENTATION BY THE HUSBAND DID NOT BIND THE WIFE BECAUSE OF THE STATUTE OF FRAUDS.

THE COURT: WELL, THAT'S THE CONCLUSION, NOT THE ADMISSIBILITY OF THE EVIDENCE. IT MAY BE THAT THE CONCLUSION

REASON, BUT I NEED TO HEAR PRELIMINARILY THE EVIDENCE AND SEE WHETHER OR NOT IT DOES VIOLATE THE STATUTE OF FRAUDS BECAUSE THERE ARE SOME EXCEPTIONS WITH THE STATUTE OF FRAUDS. SPECIFICALLY, I THINK THE SECTION THAT YOU REFERRED THE COURT TO WAS 25-5-5, OR 25-5-1, ESTATE IN THE INTEREST OF PROPERTY, NO ESTATE OR INTEREST IN REAL PROPERTY OTHER THAN LEASES FOR TERMS NOT EXTENDING ONE YEAR, NOR ANY TRUST OR POWER OR CONCERNING REAL PROPERTY OR IN ANY MATTER RELATED THERETO SHALL BE CREATED, GRANTED, ASSIGNED, SURRENDERED--AND THAT WAS THE WORD THAT YOU WANTED TO DEAL WITH IS "SURRENDER."

MR. BIRD: YES. AND THAT'S THE SECTION THAT--

THE COURT: OR DECLARED OTHERWISE THEN BY AN ACT OR OPERATION OF LAW.

YOUR ARGUMENT, MR. KUNZ, IS THAT THERE IS NO SURRENDER OF THE INTEREST IN THE PROPERTY. THIS IS A SURRENDER AS RIGHT TO PAYMENTS.

MR. KUNZ: THE PROPERTY WAS SURRENDERED AT THE TIME THE CONTRACT WAS ENTERED INTO.

THE COURT: OKAY. AND I THINK THAT I NEED TO HEAR IT IN ORDER TO MAKE THAT TYPE OF CONSIDERATION.

SO YOUR RULING ON THE STATUTE OF FRAUD IS DENIED BECAUSE I NEED TO HEAR MORE TO MAKE A FACTUAL DECISION AS TO WHAT WAS HAPPENING.

AND ALSO UNDER THE HEARSAY OBJECTION THAT YOU MAKE, RULE 804, HEARSAY EXCEPTIONS, SAYS "A STATEMENT WHICH WAS AT

THE TIME OF ITS MAKING--THIS IS WHERE A DECLARANT IS UNAVAILABLE AND ONE OF THE SPECIFIC AREAS IT DESCRIBES AN UNAVAILABLE WITNESS AS SOMEONE WHO IS PASSED AWAY OR DECEASED. AND IT SAYS "STATEMENT WHICH AT THE TIME OF ITS MAKING WAS SO FAR CONTRARY TO THE DECLARANT'S PECUNIARY OR PROPERTY INTEREST OR SO FAR TENDED TO SUBJECT DECLARANT TO CIVIL OR CRIMINAL LIABILITY OR TO RENDER INVALID A CLAIM BY THE DECLARANT AGAINST ANOTHER." AND I THINK THIS IS SPECIFICALLY WHAT THE DEFENSE IS (INAUDIBLE) SO UNDER 804 IT'S ADMISSIBLE AS HEARSAY AND UNDER 25--I'M JUST GOING TO HAVE TO HEAR IT UNDER THAT--25-5-1.

A LONG WAY OF RULING, BUT THE RECORD IS CLEAR AND I THINK YOU WANTED A CLEAR RECORD.

MR. BIRD: YES.

Q (BY MR. KUNZ) NOW, MAX, LET'S GET BACK TO THE TIME THAT YOU MADE THE ATTEMPT. IF THE CONTRACT WAS ENTERED INTO ON MAY 1ST AND THE FIRST PAYMENT WAS DUE ON MAY 1ST OF 1975, APPROXIMATELY WHAT TIME WOULD THIS CONVERSATION OCCURRED THAT YOU'RE ABOUT TO TELL US.

MR. BIRD: CAN WE HAVE A STATEMENT AS TO WHO WAS PRESENT?

MR. KUNZ: WELL, I WILL.

THE COURT: OBJECTION AS TO FOUNDATION?

MR. BIRD: YES.

THE COURT: SUSTAINED.

MR. KUNZ: WELL, FIRST OF ALL I'M TRYING TO GET TO THE TIME TO LAY A FOUNDATION. THAT'S ALL I'M TRYING TO DO.

Q (BY MR. KUNZ) DO YOU RECALL ABOUT WHEN THIS OCCURRED?

A THIS WOULD'VE OCCURRED IN MAY, MAYBE LAST OF APRIL, EARLY MAY.

Q OF '75?

A OF '75.

Q OKAY. AND WHERE DID THIS OCCUR?

A THIS OCCURRED IN MY FIELD WHICH WE CALLED THE KNOLL IN CLAY BASIN.

Q OKAY. IS THAT LOCATED ON THE PROPERTY WHICH IS THE SUBJECT OF THIS LAWSUIT?

A THAT'S TRUE.

Q AND WHO WAS PRESENT AT THE TIME?

A A CLOSE AND DEAR FRIEND OF THE FAMILY JERRY CARROLL.

Q JERRY CARROLL?

A YES.

Q AND WHO ELSE?

A AND MY FATHER AND ME.

Q OKAY. THERE WAS JUST THREE OF YOU?

A THAT'S RIGHT.

Q ALL RIGHT. COULD YOU RELATE TO ME THE--WHAT HAPPENED IN REGARD TO YOUR ATTEMPT TO MAKE THE PAYMENT?

A MY FATHER CAME DOWN TO THE FIELD. I AND JERRY WAS

DOWN IN THE FIELD. I HAD DONE A LOT OF WORK IN MY FIELD BY BURYING PIPE AND PUTTING SPRINKLER SYSTEMS INTO THESE FIELDS AND WE WERE DOWN THERE WORKING. MY FATHER CAME DOWN AND WE VISITED THERE. AND HE ASKED ME, HE SAYS, "MAX," HE SAYS, "WHAT IS--HOW IS IT TO YOU THAT I CAN TAKE SOME OF YOUR COWS OVER TO MICHAEL"--WHO IS MY BROTHER THAT WAS TRYING TO GET STARTED IN THE DAIRY BUSINESS. AND HE SAYS, "COULD WE--DO YOU THINK YOU COULD LET HIM HAVE SOME OF THEM COWS?"

AND I SAID, "WELL, SURE." I SAID, "I OWE YOU--THIS PLACE HAS GOT TO BE PAID FOR, I OWE YOU MONEY."

AND HE SAID, "WELL, WE'LL APPLY THIS TO THE PLACE."

AND I SAID, "WELL, SURE, BUT I DON'T HAVE NO IDEA WHAT MICHAEL WANTS." I SAYS, "DOES HE WANT MILK COWS THAT IS MILKING? DOES HE WANT SPRINGERS? WHAT DOES HE WANT?" I SAYS, "HE'LL JUST HAVE TO COME AND TAKE SOME COWS FROM THE HERD OF COWS." WE HAD--AT THAT TIME WE WAS MILKING--

Q WELL, I DON'T THINK YOU NEED TO EXPLAIN HOW MANY COWS YOU HAD.

A WELL, OKAY. BUT ANYWAY HE LEFT. MY FATHER LEFT. AND HE CAME BACK. AND HIS REPLY WAS, "MAX," HE SAYS, "YOU DON'T HAVE A COW ON YOUR PLACE GOOD ENOUGH FOR MICHAEL."

AND I SAID, "DAD, THAT'S ALL I'VE GOT. THIS IS WHAT THERE IS, THAT'S ALL THAT'S HERE." I SAYS, "THAT THERE'S--

AND HE SAID, AND HE WAS MAD AND HE WAS UPSET. AND I SAID, "WHAT DO YOU WANT WITH THIS PLACE? HOW ARE WE GOING

TO MAKE THESE PAYMENTS OR WHAT DO YOU WANT ME TO DO?

HE SAYS, "AREN'T YOU IN THE PROCESS OF"--WELL HE COULD SEE I WAS IN THE PROCESS OF SPRINKLING THIS GROUND. AND HE SAYS, "YOU GOT MORE WORK YOU WANT TO DO?"

AND I SAID, "WELL, SURE."

HE SAYS, "YOU GO AHEAD AND PUT IT INTO THE PLACE."

Q PUT WHAT INTO THE PLACE?

A PUT THE MONEY. HE SAYS, "IF YOU GOT THE MONEY TO PAY THIS, PUT IT INTO THIS PLACE."

Q AND AT THAT TIME DID YOU HAVE THE $10,000?

A AND HE WAS UPSET. HE WAS UPSET AT THAT TIME AND HE TOLD ME AT THAT TIME--I SAYS, "WELL, WHAT ABOUT THIS PLACE THING?"

AND HE SAYS, "WHEN I WANT THAT PLACE PAYMENT, I WILL ASK YOU FOR THAT PLACE PAYMENT." HE SAYS, "THAT PLACE PAYMENT WILL NOT DO ME NO GOOD BECAUSE OF TAXES."

Q WHEN YOU SAY "PLACE PAYMENT," WAS THAT THE $10,000 PAYMENT?

A YES, THE $10,000 ON THAT CONTRACT.

Q AND AT THAT TIME WERE YOU PREPARED TO HAVE--DID YOU HAVE THE $10,000 TO MAKE THAT PAYMENT?

A I SURE DID.

Q OKAY. AND YOU MENTIONED THAT YOUR FATHER WAS UPSET. WAS HE UPSET AT YOU?

A HE WAS UPSET AT MY BROTHER MICHAEL.

Q AND FOR WHAT PURPOSE? BECAUSE HE WOULDN'T TAKE YOUR COWS?

A BECAUSE THERE WAS NOT A COW ON MY PLACE THAT WAS GOOD ENOUGH FOR HIM IS WHAT HE TOLD ME.

Q AND DID YOU HAVE--DO YOU RECALL ANY FURTHER CONVERSATION REGARDING THE STATEMENT THAT YOU MADE THAT THE PAYMENT WOULDN'T DO ANY GOOD BECAUSE OF TAXES? DID HE ELABORATE ON THAT AT ALL?

A NO, HE NEVER ELABORATED ON IT. MY DAD ALWAYS MADE ME FEEL THAT WHEN HE WANTED SOMETHING HE WOULD COME AND GET IT. HE'D ASK FOR IT AND THAT'S THE WAY HE DONE--

MR. BIRD: I OBJECT TO THAT AS NON RESPONSIVE.

MR. KUNZ: WELL, EXCUSE ME.

Q (BY MR. KUNZ) DID YOU GET THAT FEELING FROM THAT CONVERSATION THAT OCCURRED THAT DAY ON THE KNOLL?

A I GOT THAT FEELING FROM MY FATHER ALL MY LIFE.

Q OKAY. NOW, DID YOUR FATHER EVER COME AND GET ANYTHING FROM YOU? DID HE EVER COME AND ASK YOU FOR ANYTHING, ANY MONEY OR ANYTHING ELSE?

A HE NEVER COME AND ASKED ME FOR MONEY. HE CAME AND GOT DIFFERENT THINGS THAT I HAD, YES.

Q OKAY. WHAT DID HE COME AND GET?

A THEY INVOLVED SOME CALVES, SOME BABY CALVES THAT WAS WHAT WE CALL REPLACEMENT CALVES--

Q DO YOU RECALL HOW MANY CALVES HE CAME AND GOT?

A NO, I DON'T RECALL EXACTLY. UPON UNTIL WE SOLD THE MILK COWS IN '79, THIS IS PURELY A GUESS, I WOULD ESTIMATE BETWEEN 15 AND 20 HEAD OF CALVES.

Q AND WHAT WERE THOSE CALVES WORTH AT THAT TIME?

A AT THAT TIME THOSE CALVES WERE WORTH BETWEEN $50 AND $100.

Q OKAY.

A PER HEAD.

THE COURT: HOW MANY CALVES?

THE WITNESS: I SAID BETWEEN 15 AND 20. I DON'T KNOW EXACTLY. BUT THIS WAS IN A PERIOD--THIS PERIOD WAS FROM THE TIME I BOUGHT THE PLACE UNTIL THE PERIOD OF 1979.

Q (BY MR. KUNZ) NOW, DID HE COME AND GET ANYTHING ELSE FROM YOU?

A YES. THERE WERE CORRAL PANELS--I RECALL CORRAL PANELS, POSTS, WIRE--WELL, JUST WHATEVER. HE COME AND GOT WHAT WE CALL A BIG GUN.

Q WHAT'S A BIG GUN?

A A BIG GUN IS JUST A BIG SPRINKLER ON KIND OF A CART IS WHAT IT IS.

Q AND WAS THERE EVER DISCUSSION AT THE TIME THAT YOUR FATHER WOULD COME AND GET THESE ITEMS AS TO WHETHER OR NOT HE WAS GOING TO PAY YOU OR ANY OF THOSE KINDS OF THINGS?

A NO, NO. HE JUST ALWAYS MADE ME FEEL THAT THIS WOULD ALL BE APPLIED TO THE PURCHASE OF THIS PLACE. BECAUSE HE TOLD

ME THAT HE TRYING TO MAKE THINGS WORK EVEN FOR ALL OF US. YOU'VE GOT TO REALIZE THERE WAS FIVE OF US.

Q OKAY.

A AND HE KNEW AND I UNDERSTOOD MY--

MR. BIRD: JUST A MINUTE. I OBJECT TO THIS AS NOT RESPONSIVE. VOLUNTEER STATEMENT.

THE COURT: WELL, I SUSTAIN IT ON THE BASIS OF HIS INTERPRETATION OF WHAT HIS FATHER KNEW. IS THAT THE BASIS OF YOUR OBJECTION?

MR. BIRD: YES, AND IT'S A RAMBLING STATEMENT THAT ISN'T RESPONSIVE TO THE QUESTION AND NOT MATERIAL.

THE COURT: SUSTAINED AND STRICKEN AS TO THE FATHER'S FEELINGS AND WHAT HE KNEW. YOU MAY TRY TO JUST ANSWER THE QUESTION. WE DON'T WANT YOU TO NOT GIVE A COMPLETE ANSWER. WE EXPECT THAT YOU'LL GIVE A COMPLETE ANSWER, BUT LISTEN TO THE QUESTION AND ANSWER THAT QUESTION AND HE'LL PRESENT THIS TO YOU A PIECE AT A TIME IF YOU'LL JUST ANSWER THE QUESTION YOU'RE GIVEN AND HE'LL GET INTO EVERYTHING THAT HE THINKS IS IMPORTANT.

Q (BY MR. KUNZ) MAX, WHAT DO YOU VALUE--WHAT KIND OF DOLLAR VALUE WOULD YOU PLACE ON THE VARIOUS ITEMS THAT YOUR FATHER CAME AND GOT FROM YOU BETWEEN '74 AND '79?

A I VALUED THEM RIGHT AT $10,000.

Q OKAY. NOW, OTHER THAN THE OCCASIONAL GIVING YOUR FATHER VARIOUS THINGS AT HIS REQUEST, WAS THERE EVER ANY OTHER

DISCUSSION IN REGARD IN YOUR ATTEMPTING TO PAY HIM MONEY?

A NO.

Q YOU NEVER HAD OTHER CONVERSATION WITH YOUR FATHER?

A NOT SINCE MAY.

Q WHAT ABOUT THE SALE OF CATTLE? WAS THERE EVER ANY CONVERSATION BETWEEN YOU AND YOUR FATHER AT THE TIME YOU SOLD YOUR DAIRY HERD?

A YES.

Q OKAY. NOW, COULD YOU DESCRIBE--FIRST OF ALL, WHEN DID THAT OCCUR?

A '79.

Q AND WHERE DID THIS CONVERSATION OCCUR?

A AT MY PLACE.

Q WHEN YOU SAY "YOUR PLACE" WHERE ON YOUR PLACE?

A WELL, THE RANCH.

Q OKAY. BUT WHERE ON THE RANCH?

A IN THE YARDS--OUT IN THE YARDS AND THE CORRALS.

Q OKAY. AND WHO WAS PRESENT AT THE TIME?

A JOYCE, MY WIFE.

Q AND WHO ELSE?

A MY DAD.

Q WERE YOU THERE?

A YES, MYSELF.

Q NO ONE ELSE?

A NO, AS I RECALL.

Q RELATE TO ME AS BEST YOU RECALL THE CONVERSATION THAT YOU HAD THAT DAY WITH YOUR FATHER.

A I SOLD MY MILK COWS. AND THEY WERE TWO INDIVIDUALS THAT BOUGHT THAT HERD OF COWS.

MR. BIRD: EXCUSE ME. I WANT TO RENEW MY OBJECTION BECAUSE THIS WAS AFTER THE ESCROW AGREEMENT. AND AS I ARGUED--AS I STATED PREVIOUSLY, I THINK THE POSITION UNDER THE STATUTE OF FRAUDS IS DIFFERENT UNDER THE ESCROW AGREEMENT--

THE COURT: DO YOU MEAN TRUST?

MR. BIRD: THEN IT WAS BEFORE THE TRUSTEES MUST ACT TOGETHER AND ONLY ONE WAS PRESENT AND I OBJECT TO IT FOR THAT REASON.

MR. KUNZ: YOUR HONOR, THERE'S BEEN NO EVIDENCE PRESENTED THAT THIS ESCROW AGREEMENT AND THE RIGHT TO RECEIVE MONEY WAS EVER ASSIGNED TO THE TRUST, NOR WAS THERE EVER A DEED FROM THE TRUST PLACED INTO ESCROW. THE DOCUMENTS THAT WERE PLACED WITH THE ESCROW AGENT WERE THE ORIGINAL ESCROW AGREEMENT ENTERED INTO BETWEEN GEORGE, LARUE, MAX AND JOYCE AND THE DEED, IN FACT, IS FROM GEORGE AND LARUE AS HUSBAND AND WIFE TO MAX AND JOYCE.

THE COURT: AGAIN, I THINK YOU'RE ASKING THE COURT TO RULE UPON SOMETHING THAT'S A LEGAL CONCLUSION THAT THE COURT WILL REACH BASED UPON THE EVIDENCE AND I'VE FRAMED IT AS AN OBJECTION TO THE PRESENTATION OF EVIDENCE. YOU MAY WELL BE RIGHT IN WHAT YOU SAY--A CONCLUSION THAT THE COURT REACH--BUT

THAT DOESN'T PREVENT THE INTRODUCTION OF THE EVIDENCE.

MR. BIRD: I SIMPLY WANT TO RENEW IT BECAUSE THIS WAS AFTER THE TRUST AGREEMENT WAS EXECUTED.

THE COURT: I UNDERSTAND THAT AND, I HAVEN'T READ ALL THESE DOCUMENTS, BUT IT SEEMS TO ME THAT IF THE DEFENDANT WASN'T A--WITHOUT RULING, I'M NOT RULING ON THIS--THE DEFENDANT WASN'T A PARTY TO THE TRUST AGREEMENT AS A GRANTOR--WAS HE A GRANTOR ON THE TRUST?

MR. KUNZ: HE WAS--

THE COURT: HE WAS A BENEFICIARY.

MR. KUNZ: HE WAS NAMED AS A TRUSTEE OF THE FAMILY TRUST--

THE COURT: A SUCCESSOR.

MR. KUNZ: --AND HE'S A--AS A SUCCESSOR TRUSTEE, EXCUSE ME, AND ALSO A BENEFICIARY OF THAT TRUST.

THE COURT: IT SEEMS TO ME THAT THE OPERATIVE DOCUMENT IS THE DEED AND INITIAL AGREEMENT, THE ESCROW AGREEMENT, AND THAT--YOU KNOW--THE AFFECT OF THE LATER TRUST AGREEMENT AT LEAST DOESN'T PREVENT THE COURT FROM RECEIVING THE DOCUMENTS.

I'M GOING TO OVERRULE THE OBJECTION. AND IT MAY BE THAT HE JUST NOT BOUND BY THE TERMS OF THE ESCROW AGREEMENT IN TERMS OF WHAT HIS OBLIGATIONS WERE.

YOU MAY PROCEED.

Q (BY MR. KUNZ) IN THAT REGARD, MAX, DID YOU EVER--

WERE YOU EVER TOLD BY ANYONE THAT YOU NEEDED TO MAKE PAYMENTS TO PAUL BARTON?

A NO.

Q DID YOU KNOW THAT THE ESCROW AGREEMENT AND THE WARRANTY DEED TO YOUR PLACE WAS DELIVERED TO PAUL BARTON?

A NO.

Q ALL RIGHT. LET'S GET BACK TO 1979 WHEN YOU WERE IN YOUR CORRALS WITH YOUR FATHER AND YOUR WIFE. WHY DON'T YOU GO AHEAD AND RELATE YOUR RECOLLECTION OF THE CONVERSATION.

A WELL, MY FATHER CAME DOWN TO THE PLACE AND I TOLD HIM THAT I HAD SOLD THE MILK COWS AND THEY WERE GOING TO GO TO TWO INDIVIDUALS--TWO DIFFERENT INDIVIDUALS. WALLY STEPHENSON WAS THE ONE FELLOW AND JENKINS--HOWARD JENKINS' FAMILY WAS THE OTHER.

I SAID, "FATHER, I WANT YOU TO--YOU'RE GOING TO HAVE TO TAKE PART OF THIS MONEY." OR TAKE THIS MONEY. I WANTED HIM TO TAKE IT ALL, BUT HE SAYS, "I DON'T WANT NONE OF IT. I CAN'T USE IT."

Q OKAY. WAIT JUST A MOMENT. YOU SAY YOU WANTED HIM TO TAKE IT ALL?

A YES.

Q WHAT DO YOU MEAN BY ALL?

A I WANTED HIM TO TAKE BOTH SALES. THEY WAS TWO DIFFERENT--THEY WAS GOING TO BE TWO DIFFERENT--THERE WAS ACTUALLY TWO DIFFERENT SALES AND I WANTED HIM TO TAKE BOTH

SALES OF THOSE CATTLE.

Q AND WHAT WAS THE DOLLAR VALUE OF EACH OF THOSE SALES, DO YOU RECALL?

A IT'S RIGHT THERE ON THAT PAPER. THE ONE OF THEM WAS RIGHT AT $25,000 AND THE OTHER ONE WAS 56, 58--HOW MUCH IS IT? IT WAS $58,000.

Q AND SO YOU SAY YOU OFFERED YOUR FATHER THE TWO SALES, 58,000 AND 25,000?

A YES.

Q AND WHAT DID YOUR FATHER SAY?

A HE SAYS, "I DON'T WANT THEM. I CAN'T USE THAT MONEY." HE SAYS, "I CAN'T USE THAT MONEY."

Q EXCUSE ME, MAX. DID HE MAKE--DID HE EXPLAIN WHY HE COULDN'T USE THE MONEY?

A HE SAID IT WOULD JUST GO TO TAXES. I DIDN'T KNOW HIS INCOME. HE SAID IT WOULD JUST GO TO TAXES.

Q SO--

A AND I REPLIED THAT YOU'RE GOING TO HAVE TO TAKE ONE AND SO HE AGREED TO TAKE THE ONE DRAFT.

Q AND--

A AND IT WAS THE SMALLER. HE SAYS, "I WANT THE--IF YOUR INSISTING I'LL TAKE THE SMALLER DRAFT." AND THAT WAS THE WALLY STEPHENSON DRAFT.

Q AND THAT WAS THE--WELL, I'M GOING TO ASK YOU TO IDENTIFY WHAT HAS BEEN MARKED AS DEFENDANTS EXHIBIT D-7, MAX,

AND ASK IF YOU CAN IDENTIFY THAT DOCUMENT FOR ME, PLEASE.

A NOW, WHAT DID YOU--I MISUNDERSTOOD YOU HERE, RON.

Q COULD YOU IDENTIFY WHAT THAT DOCUMENT REPRESENTS?

A THIS DOCUMENT REPRESENTS THE DRAFT THAT MY FATHER RECEIVED FROM THOSE CATTLE.

Q OKAY. AND DOES THAT HELP YOU DETERMINE WHAT THE AMOUNT THAT ACTUALLY WENT TO YOUR FATHER AS THE SALE OF YOUR CATTLE?

A TO THE PENNY, $24,980.

Q OKAY.

MR. KUNZ: I'D MOVE FOR THE ADMISSION OF D-7 TO ILLUSTRATE THE VALUE.

THE COURT: HAVE YOU SEEN D-7?

MR. BIRD: YES, I'VE SEEN IT. I OBJECT TO IT FOR THE REASON THAT--WELL, I OBJECT TO IT BECAUSE THE CATTLE WERE NOT--DID NOT BELONG TO HIM, THEY BELONGED TO GEORGE, AND I'M GOING TO GO INTO THAT. AND I OBJECT TO THIS AS BEING A VALID DRAFT ON THE BASIS THAT THE WITNESS HAS TESTIFIED, BUT I THINK THE COURT'S GOING TO RECEIVE IT OVER MY OBJECTION.

MR. KUNZ: MY PURPOSE, YOUR HONOR, WAS TO DETERMINE THE AMOUNT, NOT NECESSARILY TO DETERMINE WHO OWNED THE COWS OR ANY OF THOSE KINDS OF THINGS. AND, OF COURSE, HE'S TESTIFIED NOW SO I'LL WITHDRAW THE EXHIBIT IF THAT WOULD HELP.

THE COURT: WELL, DO YOU WANT ME TO RULE UPON IT?

MR. KUNZ: YEAH, GO AHEAD AND RULE.

THE COURT: I'LL OVERRULE IT. IT WILL BE RECEIVED.

Q (BY MR. KUNZ) NOW, YOU SAY YOUR FATHER DID ACCEPT THAT AMOUNT?

A YES, SIR.

Q AND HOW DID HE RECEIVE THE MONEY?

A FROM WHERE WALLY STEPHENSON BORROWED THE MONEY--WHERE HE GOT HIS--FHA. THERE WAS AN FHA. I DON'T KNOW HOW THEY DO THEIR MONEY, WHETHER IT WAS A CHECK, CASH OR--BUT THAT'S HOW HE RECEIVED THE MONEY THROUGH THIS FHA.

Q DID YOUR FATHER EVER ACKNOWLEDGE TO YOU THAT HE HAD RECEIVED THE MONEY?

A YES.

Q OKAY. NOW, MR. FISHER, MR. BIRD HAS INDICATED THAT THAT WASN'T FOR THE SALE OF YOUR COWS, THAT WAS FOR THE SALE OF GEORGE AND LARUE'S COWS; IS THAT TRUE?

A THAT'S NOT TRUE.

Q OKAY. DID YOU KEEP ANY COWS FOR YOUR PARENTS?

A YES.

Q OKAY. WHAT COWS DID YOU KEEP FOR YOUR PARENTS?

A I KEPT--I DON'T KNOW EXACT NUMBER, BUT I WOULD SAY BETWEEN 12 TO 14 HEAD OF THOSE COWS AT THE TIME I PURCHASED THE PLACE IN '75 WAS HIS--

Q EXCUSE ME. THE DOCUMENTS SHOW, AND I THINK YOU'VE PREVIOUSLY TESTIFIED, THAT YOU PURCHASED IT IN '74.

A WELL, OKAY, '74. BUT THEY WERE THERE. HE HAD SOLD

HIS MILK COWS. HIS COWS AND I NEVER TOOK--GOT NONE OF HIS PRODUCING COWS, THE HEIFERS OR NOTHING, BECAUSE I HAD MY OWN HERD BY THAT TIME BUILT AND THERE WAS SOME OF THESE COWS THAT WAS YOUR OLDER COWS. WELL, WE CALL THEM KIND OF CALLS, BUT WERE STILL IN A MILKING LACTATION.

AND HE SAYS, "MAX, JUST KEEP THOSE COWS AND WEAR THEM OUT AND SELL THEM AND SELL THEM TO ME--JUST SELL THEM--AND THAT'S WHAT I DONE. I TOOK THE COWS AND WHEN THEY WERE GONE I HAULED THEM TO THE SALE.

Q OKAY. EXCUSE ME.

WHEN YOU SAY WHEN THEY WERE GONE, WHAT DO YOU MEAN?

A I MEAN WHEN THEY WERE WORE OUT AND NO GOOD TO NOBODY. THEY WOULDN'T PRODUCE MILK. IF A MILK COW DON'T PRODUCE MILK AND YOU'RE IN THE MILKING BUSINESS, YOU DON'T NEED HER ON THE PLACE. YOU DISPOSE OF THEM.

Q NOW, DID YOU BREED ANY OF THOSE COWS SO THAT YOU CONTINUED TO MILK THEM OR FOR OTHER LACTATION PERIODS?

A OH, NO. THEY WERE OLDER COWS. THEY WERE SOME THREE TITTED COWS. THEY WERE COWS THAT THE PEOPLE THAT COME BOUGHT THE COWS DIDN'T WANT.

Q OKAY. AND DID YOU EVER SELL THOSE COWS?

A YES.

Q AND WHEN DID YOU DO THAT?

A IN '75, '76. BETWEEN THAT PERIOD OF TIME.

Q AND DID YOU GIVE YOUR FATHER AND MOTHER THE MONEY

FOR THOSE COWS?

A I DIDN'T RECEIVE THE MONEY. I FOLLOWED THEM COWS TO THE AUCTION AND THOSE COWS WERE PACKING HIS BRAND. THEY WEREN'T MY COWS. YOU CAN'T SELL OTHER PEOPLE'S CATTLE. I HAULED THEM CATTLE TO THE SALE AND THAT CHECK WAS MADE AND DELIVERED RIGHT TO MY FOLKS.

Q AND THAT WAS IN '75?

A BETWEEN '75 AND '76.

Q OKAY. BUT THE COWS IN 1979, WHOSE BRAND DID THEY HAVE ON THEM?

A THEY PACKED MY BRAND.

Q WHEN YOU HAD THIS CONVERSATION IN 1979 WITH YOUR FATHER ABOUT TRYING TO GET HIM TO TAKE BOTH OF THE PAYMENTS, OR BOTH OF THE CHECKS FOR THE SALE OF THE CATTLE, DID YOU HAVE ANY FURTHER CONVERSATION WITH HIM ABOUT HOW IT WAS YOU WERE GOING TO PAY FOR THE RANCH AND GET IT IN YOUR NAME?

A NO.

Q OKAY. WAS THERE EVER A POINT IN TIME AFTER 1979 THAT YOU HAD CONVERSATION WITH EITHER ONE OR BOTH OF YOUR PARENTS IN REGARD TO PAYMENTS FOR THE RANCH?

A YES.

Q AND WHEN DID THE NEXT ONE OCCUR?

A IT OCCURRED AT THE TIME WE HAD TO DESTROY THE OLD HOME.

Q OKAY.

A AND THAT WAS '78.

Q '78?

A '78, OH, NO. '88. '88, '89. AND I HAD--WE HAD REMODELED THIS HOME PREVIOUS YEARS BEFORE AND DONE A LOT OF WORK ON IT. MY BROTHER-IN-LAW'S A CARPENTER. I WASN'T--DIDN'T CLAIM TO BE A CARPENTER AND I HAD A LOT OF HELP DOING THIS. BUT ANYWAY, WE DIDN'T--THE OLD HOME WAS AN OLD HOME THAT WAS BUILT ON THE GROUND AND THERE WAS A LOT OF IT YOU COULDN'T GET UNDER.

Q OKAY. I DON'T THINK YOU NEED TO EXPLAIN HOW THE OLD HOME WAS BUILT, BUT, MAX, YOU SAY THIS OCCURRED IN 1988 OR '89?

A YES.

Q AND THIS IS WHEN THE HOME WAS TORE DOWN?

A THIS IS AT THE TIME THE OLD--YES.

Q BEFORE WE GET TO THAT, YOUR MOTHER HAS TESTIFIED ABOUT A CONVERSATION THAT OCCURRED AT YOUR HOME AT THE TIME APPARENTLY ONE OF THE CORNERS WERE FALLING AND YOU WERE REMODELING THE HOME. DO YOU RECALL EVER CONVERSING WITH YOUR MOTHER AND FATHER AT THAT TIME?

A THAT'S AT THE TIME IT WAS. THAT'S AT THE TIME THAT THIS TOOK PLACE. I TORE OFF PART OF THE OLD HOME AND HAD GOT UNDER THE OTHER PART AND WE DUG TRENCHES BACK UNDER IT AND SEEN THAT THE OLD HOME WAS ROTTED. IT WAS UNSAVEABLE. IT WAS UNSAVEABLE. I CALLED MY FATHER--

Q WAIT JUST A--

A --AND I CALLED MY MOTHER.

Q WAIT JUST A MOMENT. BEFORE YOU GET INTO THAT, SO THIS PARTICULAR INCIDENT ABOUT WHAT YOU'RE TO DESCRIBE, IS THIS THE SAME INCIDENT THAT YOUR MOTHER PREVIOUSLY TESTIFIED TO, OR WAS THERE ANOTHER INCIDENT THAT THEY CAME BY WHEN YOU WERE REMODELING THE HOME?

A THIS IS THE WAY I RECALL THAT THAT WAS WHEN THAT INCIDENT TOOK PLACE.

Q AND COULD YOU RELATE, FIRST OF ALL, WHERE THE CONVERSATION TOOK PLACE?

A IN MY--IN WHAT WAS LEFT OF THE OLD HOME.

Q AND WHO WAS PRESENT AT THE TIME THE CONVERSATION TOOK PLACE?

A THERE WAS ME, MY WIFE, MY FATHER AND MY MOTHER.

Q OKAY. WERE ANYONE ELSE PRESENT?

A NO. WAIT, YES. YES, THERE WAS. THERE WAS CHICO CAPWELL AND PEGGY CAPWELL.

Q CHICO AND PEGGY CAPWELL?

A BUT NOT--THEY DIDN'T HEAR THE CONFERENCE I HAD WITH DAD AND MOTHER, BUT THEY WERE THERE WHEN DAD AND MOTHER WERE THERE TO LOOK AT THE OLD HOME.

Q ALL RIGHT. TELL ME ABOUT THE CONVERSATION THAT OCCURRED BETWEEN YOU AND YOUR PARENTS.

MR. BIRD: CAN YOU GET A TIME FOR THIS?

MR. KUNZ: I THINK WE'VE ESTABLISHED THAT IT'S 1979 IN WHAT WAS LEFT OF THE OLD HOME WITH CHICO AND PEGGY CAPWELL PRESENT, BUT THEY WERE NOT PRESENT TO HEAR THIS CONVERSATION.

THE COURT: IS THAT HIS TESTIMONY? I THOUGHT HIS TESTIMONY WAS '88 OR '89.

THE WITNESS: '88 OR '89.

MR. KUNZ: CORRECT. HIS TESTIMONY WAS '88 OR '89 AND THAT'S CORRECT.

THE COURT: ARE YOU SATISFIED WITH THAT, MR. BIRD?

MR. BIRD: I UNDERSTOOD '88 OR '89 WAS WHEN HE BUILT THE NEW HOME, TORE DOWN THE OLD ONE, AND THAT THIS CONVERSATION TOOK PLACE DURING REMODELING.

THE COURT: NO, THAT'S NOT HIS TESTIMONY.

MR. BIRD: OH, I'M--ALL RIGHT. ALL RIGHT.

MR. KUNZ: HIS TESTIMONY WAS THAT THE CONVERSATION TOOK PLACE AT THE TIME OF TEARING DOWN THE HOME.

THE WITNESS: TRUE.

Q (BY MR. KUNZ) DO YOU RECALL ANY CONVERSATION OCCURRING AT YOUR HOME WITH YOUR MOTHER AND FATHER AT THE TIME YOU WERE REMODELING?

A YES, THERE WAS QUITE A FEW CONVERSATIONS, BUT NOTHING TO DO WITH--

Q WITH THE--

A YES, YES.

Q OKAY. AND DURING THE OTHER SEVERAL CONVERSATIONS

WAS THERE EVER ANY DISCUSSION ABOUT PAYMENTS OWED ON THE PROPERTY?

A NO.

Q OKAY. NOW, AT THE TIME YOU HAD YOUR PARENTS UP THERE TO DISCUSS DEMOLITION OF THE OLD HOME, IS THAT WHEN THE CORNER WAS FALLING DOWN?

A YES.

Q AND WAS THE CORNER FALLING DOWN AT A PRIOR TIME WHEN YOU REMODELED THE HOUSE?

A I DIDN'T THINK SO, BUT IT WAS.

Q OKAY.

A I THINK NOW--

Q BUT WERE YOU AWARE OF IT AND DID YOU DISCUSS THAT WITH YOUR PARENTS?

A NOT WHEN WE WAS REMODELING.

Q OKAY.

A BECAUSE WE HAD REMODELED THE HOME QUITE A FEW YEARS BEFORE THE--NOT QUITE A FEW, BUT FIVE OR SIX YEARS--I DON'T REMEMBER THE YEARS, BUT WE'D REDONE THE HOME.

Q ALL RIGHT. MAX, AT THE TIME THEN THAT YOU HAD CONVERSATION WITH YOUR PARENTS IN RELATIONSHIP TO THE CORNER OF THE HOUSE FALLING THROUGH, WOULD THAT HAVE BEEN AT THE TIME THE HOUSE WAS BEING DEMOLISHED?

A YES.

Q OKAY. NOW, LET'S GET BACK TO THE CONVERSATION THAT

DID OCCUR BETWEEN YOU AND YOUR PARENTS. COULD YOU RELATE THAT CONVERSATION THE WAY IT OCCURRED AS BEST TO YOUR RECOLLECTION?

A THE BEST I RECOLLECT IS I WAS UP--QUITE UPSET WITH THE IDEA THAT WE HAD PUT A LOT OF WORK AND TIME INTO REMODELING THE OLD STRUCTURE AND WE LOST THAT, WHICH AMOUNTED TO QUITE A LOT. AND WE ENDED UP HAVING TO DESTROY THE OLD HOME. AND I BROUGHT MY FATHER AND MOTHER UP TO LOOK.

Q OKAY. FIRST OF ALL, DID YOU INVITE YOUR FATHER AND MOTHER UP TO YOUR HOME?

A YES, I DID.

Q OKAY. GO AHEAD AND EXPLAIN.

A I FELT THAT THEY SHOULD SEE THE SITUATION BECAUSE THEY WAS STILL--THEY WAS STILL DEBT OWED ON THIS PLACE. I KNOWED I STILL OWED MONEY ON THIS PLACE. AND I KNOW THAT IF I HAD TO DESTROY THIS HOME AND BUILD A NEW ONE THAT IT COULD PUT ME IN A HARDSHIP.

Q OKAY. SO DESCRIBE THE CONVERSATION THEN THAT TOOK PLACE.

A WELL, MY FATHER ASKED ME IF I COULD BUILD A HOME. I SAID, "I CAN BUILD A HOME, BUT I DON'T KNOW WHETHER I CAN MAKE MY PLACE PAYMENTS."

Q OKAY. AND DID YOU OFFER ANOTHER ALTERNATIVE IN REGARD TO--

MR. BIRD: JUST A MINUTE. THAT'S LEADING THE WITNESS. I OBJECT TO IT.

THE COURT: SUSTAINED.

Q (BY MR. KUNZ) OKAY. GO AHEAD AND JUST FINISH RELATING THE CONVERSATION, MAX, AS BEST YOU CAN.

A WELL, I TOLD MY FATHER THAT THERE WAS A PLACE--AT THAT TIME THERE WAS A HOME AND--I DON'T KNOW THE ACRES--TWO OR THREE ACRES THAT WAS DOWN THE ROAD FROM THERE TWO MILES. DON'T QUOTE ME THE EXACT DISTANCE, BUT AROUND TWO MILES. THAT WAS AVAILABLE AT THAT TIME FOR LESS MONEY I FELT THAN WOULD TAKE TO BUILD ME A NEW HOME HERE.

Q OKAY. AND WHO OWNED THAT HOME AT THAT TIME?

A JAMES AND HELENE OMAN.

Q JAMES AND HELENE OMAN?

A YES.

THE COURT: WHAT'S THE LAST NAME?

THE WITNESS: OMAN.

THE COURT: O-M-A-N?

THE WITNESS: UH HUH. (AFFIRMATIVE)

Q (BY MR. KUNZ) ALL RIGHT. PROCEED.

A AND MY FATHER SAYS, "YOU KNOW THAT YOU CAN'T DO THAT." HE SAYS, "YOU CAN'T LIVE OFF ONE OF THESE RANCHES AND RUN IT." HE SAYS, "IT'S A DETERRENT TO YOU." HE SAYS, "IF YOU'RE GOING TO RUN A PLACE YOU'VE GOT TO LIVE ON IT."

Q OKAY. AND WHAT WAS YOUR RESPONSE?

A I SAYS, "WELL, WHAT HAPPENS WHEN YOU ENFORCE ME TO PAY THESE PAYMENTS? I CAN'T DO IT."

AND HE SAYS, "DON'T WORRY ABOUT IT." HE SAYS, "I'M GETTING THIS TAKEN CARE OF AS QUICK AS I CAN TO MAKE IT EQUAL WITH YOU KIDS." THAT'S THE WAY HE MADE ME FEEL.

Q OKAY. BUT WHAT DID HE SAY TO MAKE YOU FEEL THAT WAY? DO YOU RECALL--

A HE SAYS, "YOU BETTER BUILD A HOME."

Q OKAY. AND WAS THERE A CONVERSATION REGARDING YOU NEEDED TO START MAKING PAYMENTS AND JOYCE NEEDED TO GET RECORDS--

MR. BIRD: JUST A MINUTE. THAT'S LEADING AGAIN. I'D OBJECT TO THAT.

MR. KUNZ: WAIT JUST A MOMENT. I'M REFERRING TO A CONVERSATION THAT OCCURRED THAT MRS. FISHER HAS PREVIOUSLY TESTIFIED TO.

MR. BIRD: YOU'RE STATING THE SUBSTANCE OF IT AND I OBJECT TO IT AS LEADING.

MR. KUNZ: I'LL WITHDRAW THAT QUESTION, YOUR HONOR.

Q (BY MR. KUNZ) MAX, WAS THERE ANY CONVERSATION THAT EVEN RESEMBLED THE REPRESENTATION OF THE CONVERSATION THAT YOUR MOTHER GAVE EARLIER HERE ON THE STAND?

A NO.

Q WHAT DIFFERENT--

A I MEAN, THEY WAS THERE. THEY WERE THERE.

Q OKAY. DID YOUR FATHER ASK FOR PAYMENTS?

A NO.

Q DID HE ASK FOR A RECORD OF PAYMENTS?

A NO.

Q WHAT DID HE SAY ABOUT PAYMENTS?

A NOTHING, OTHER THAN--HE DIDN'T SAY NOTHING ABOUT THE PAYMENTS. I WAS THE ONE THAT MENTIONED HAVING TO MAKE THE PAYMENTS. AND HE SAYS WHEN I--AND HE ALWAYS MADE ME FEEL IN THIS WHOLE--IN THE LIFE OF THIS CONTRACT--

MR. BIRD: I OBJECT TO THIS AS A VOLUNTEER STATEMENT AND INCOMPETENT.

Q (BY MR. KUNZ) WELL, MAX, HOW DID YOUR FATHER MAKE YOU FEEL AS A RESULT OF THAT CONVERSATION?

MR. BIRD: I OBJECT TO THAT AS INCOMPETENT. IT'S IMPOSSIBLE TO DETERMINE--

THE COURT: I DON'T UNDERSTAND WHAT YOU MEAN BY INCOMPETENT.

MR. BIRD: TO SAY HOW THE FATHER MADE HIM FEEL WITHOUT HIM BEING ABLE TO DESCRIBE IT. IN THE ABSENCE OF A DECEASED, I SUBMIT IT IS INCOMPETENT. IT JUST CAN'T BE DONE.

THE COURT: I THINK WHAT THE QUESTION WAS IS HOW HE FELT, NOT HOW--

MR. BIRD: NO, HOW DID HIS FATHER MAKE HIM FEEL.

THE COURT: I'LL OVERRULE. I DON'T KNOW THAT IT'S EXTREMELY IMPORTANT, HOWEVER. HE CAN TESTIFY ABOUT HOW HE FELT ABOUT HIS FATHER AND ABOUT HIS FATHER'S ACTIONS MADE HIM FEEL WITH RESPECT TO THIS MATTER. THE DIFFICULTY HE HAS IS

HE'S GOT TO TIE TO SOME ACTIONS. AND YOU DIDN'T DO THAT.

MR. KUNZ: TIE IT TO SOME ACTIONS?

THE COURT: YEAH.

MR. KUNZ: WELL, LET ME GO BACK THEN AND I'LL REPHRASE MY LINE OF QUESTIONING.

Q (BY MR. KUNZ) MAX--

THE COURT: IN OTHER WORDS--

MR. KUNZ: OKAY. I'M SORRY.

THE COURT: GO AHEAD. YOU MAY PROCEED.

Q (BY MR. KUNZ) MAX, WAS THERE ANYTHING ELSE THAT YOUR FATHER SAID ABOUT YOUR CONCERN FOR THE PAYMENTS OTHER THAN DON'T BUILD THE HOME--OR GO AHEAD AND BUILD THE HOME?

A YES.

Q WHAT DID HE SAY?

A HE SAID TO THE AFFECT, "I WISHED YOU KIDS WOULD TRY TO APPRECIATE A LITTLE MORE WHAT WE'RE DOING FOR YOU THAN--I GUESS HE THOUGHT WE WAS ACTING KIND OF BITTER TOWARDS HIM OR SOMETHING, BUT HE MADE THE STATEMENT--MY FATHER MADE THAT STATEMENT THAT DAY. HE SAYS,--AND HE TURNED TO I AND THE WIFE AND SAYS, "I WISH YOU WOULD SHOW US A LITTLE MORE APPRECIATION TO WHAT WE'RE DOING--TRYING TO DO FOR YOU."

Q OKAY. AND DID HE ELABORATE ON WHAT IT WAS HE WAS TRYING TO DO FOR YOU?

A NO.

Q OKAY.

A HE DIDN'T HAVE TO.

Q WHAT DO YOU MEAN HE DIDN'T HAVE TO?

A WELL, I COULD SEE IT. HE WASN'T FORCING ME TO PAY FOR THE PLACE.

Q OKAY. EARLIER YOU STATED SOMETHING TO THE EFFECT OF YOUR FATHER INDICATING--

MR. BIRD: JUST A MINUTE. I'VE GOT TO MOVE TO STRIKE THAT LAST STATEMENT BECAUSE IT'S NOT SUPPORTED BY THE CONVERSATION THAT HE'S ALREADY GIVEN.

THE COURT: I'LL OVERRULE THAT. HE CAN TESTIFY AS TO WHAT HIS FEELINGS ABOUT THE CONVERSATION WERE. THERE ARE A LOT OF THINGS THAT ARE UNSTATED IN A CONVERSATION BASED UPON THE RELATIONSHIP BETWEEN THE PARTIES. HE CAN TESTIFY. THE COURT DOESN'T HAVE TO ACCEPT THEM.

Q (BY MR. KUNZ) MR. FISHER--EXCUSE ME--MAX, EARLIER YOU STATED THAT YOUR FATHER MADE SOME SORT OF COMMENT ABOUT "DON'T WORRY ABOUT IT, I'LL GET THIS TAKEN CARE OF AS SOON AS I CAN." I'D LIKE YOU TO EXPLAIN THAT. EXACTLY WHAT HE SAID AND WHY HE SAID IT.

MR. BIRD: I OBJECT TO THAT. HE'S TESTIFIED TO WHAT HE SAID, IF HE HASN'T ALREADY DONE IT. BUT WHY HE SAID IT I SUBMIT IS INCOMPETENT; IT'S IN THE MIND OF THE SAYER.

THE COURT: SUSTAINED. SUSTAINED AS TO WHY HE MAY HAVE SAID IT. THAT GOES BEYOND HIS KNOWLEDGE.

MR. KUNZ: THAT'S FINE.

Q (BY MR. KUNZ) WHAT DID HE SAY IN THAT REGARD?

A YOU'LL HAVE TO ASK ME THE QUESTION AGAIN. I'VE GOT LOST NOW.

Q OKAY. YOU PREVIOUSLY STATED THAT WHEN YOU INDICATED YOU COULD NOT BUILD A NEW HOME AND MAKE THE PAYMENTS, HE INDICATED SOMETHING--AND I'M TRYING NOT TO PUT WORDS IN YOUR MOUTH, BUT YOU SAID THAT HE SAID SOMETHING ABOUT DON'T WORRY ABOUT IT, I'LL GET THIS TAKEN CARE OF.

I'D LIKE TO KNOW A LITTLE BIT MORE ABOUT THAT CONVERSATION. COULD YOU RELAY IT--

MR. BIRD: I SUBMIT THAT HE'S ALREADY GIVEN THE CONVERSATION AND THIS IS REPETITION.

MR. KUNZ: IT WASN'T CLEAR TO ME AND I BELIEVE WE WERE CUT OFF AT THE TIME, YOUR HONOR.

THE COURT: OVERRULED. WHY DON'T YOU JUST ASK HIM IF THERE WAS ANYTHING ELSE SAID THAT HE HASN'T TOLD US.

Q (BY MR. KUNZ) OKAY. WAS THERE ANYTHING ELSE SAID THAT YOU HAVEN'T PREVIOUSLY RELATED OR EXPLAINED?

A NOT THAT I KNOW OF RIGHT NOW REGARDING--IF I UNDERSTAND YOUR QUESTION RIGHT--DID MY FATHER ASK ME ANYTHING OR DID WE HAVE ANY MORE CONVERSATIONS ABOUT THIS OR WHAT?

Q WELL, IT WASN'T CLEAR TO ME BECAUSE I BELIEVE WE WERE CUT OFF AT THE TIME, HOW YOU ANSWERED THE QUESTION OF WHAT YOUR FATHER'S RESPONSE WAS TO YOUR STATEMENT YOU COULDN'T MAKE ANY FURTHER PAYMENTS. AND I WOULD LIKE TO KNOW HOW YOUR

FATHER RESPONDED.

MR. BIRD: I SUBMIT HE'S ALREADY GIVEN THAT CONVERSATION.

THE COURT: WELL, LET'S HAVE HIM GIVE IT. OVERRULED.

THE WITNESS: MY FATHER--MY FATHER TOLD ME THAT I WAS TO GO AHEAD AND BUILD THE HOME--THE NEW HOME. THAT HE WAS GOING TO HAVE THE REST OF THIS--TRY TO GET THE REST OF THESE AFFAIRS TAKEN CARE OF. THAT HE WOULDN'T NEED THESE--I WOULDN'T BE PRESSED TO MAKE THESE PAYMENTS.

Q (BY MR. KUNZ) DID HE ACTUALLY SAY YOU WOULD NOT BE PRESSED TO MAKE PAYMENTS?

A NO, HE DIDN'T ACTUALLY SAY THAT I WOULDN'T BE PRESSED TO IT, BUT HE SAYS, "DON'T WORRY ABOUT IT." HE SAYS, "DON'T WORRY ABOUT IT." HE SAYS, "GO AHEAD AND BUILD THE NEW HOME."

Q OKAY.

A NO, HE NEVER TOLD ME NOT TO WORRY ABOUT IT AND HE DIDN'T TELL ME HE RELIEVED ME OF--

MR. BIRD: HE'S MAKING COMMENTS THAT ARE NOT IN THE CONVERSATION AND I OBJECT TO IT AND MOVE THAT THEY BE STRICKEN.

THE COURT: OVERRULED. HE IS SAYING THAT HE DIDN'T SAY THOSE THINGS.

Q (BY MR. KUNZ) MAX, AS A RESULT OF THAT CONVERSATION

THAT YOU HAD WITH YOUR FATHER--DID YOUR MOTHER SAY ANYTHING, BY THE WAY, AT THAT TIME?

A I DON'T RECALL HER EVER SAYING.

Q YOU DON'T RECALL HER INDICATING ANYTHING?

A (INAUDIBLE)

Q OKAY. AS A RESULT OF THAT CONVERSATION THAT YOU HAD WITH YOUR PARENTS, WHAT THEN DID YOU DO WITH THE OLD HOUSE?

MR. BIRD: I OBJECT TO THE FORM OF THAT QUESTION SAYING THAT IT'S CONSEQUENTIAL. IF HE WANTS TO TESTIFY AS TO WHAT HE DID, BUT I OBJECT TO HIS SAYING IT'S BECAUSE OF THAT CONVERSATION.

THE COURT: YOU'RE CORRECT. SUSTAINED.

Q (BY MR. KUNZ) SUBSEQUENT TO THAT CONVERSATION THAT YOU HAD WITH YOUR PARENTS, WHAT DID YOU DO WITH THE OLD HOUSE?

A I DESTROYED IT.

Q AND--

A LET ME REPHRASE THAT. I SALVAGED ALL THAT I COULD SALVAGE OUT OF IT, WHICH WAS--WELL, I SALVAGED AND THEN I DESTROYED.

Q OKAY. AND THEN WHAT DID YOU DO THEREAFTER?

A WE WENT TO PROCEEDING TO BUILD A NEW HOME.

Q AND HAVE YOU COMPLETED THE CONSTRUCTION OF A NEW HOME?

A JUST ABOUT. NOT COMPLETELY.

Q AND--

A BUT WE LIVE IN THE NEW HOME.

Q DO YOU OWE ANYONE ANY MONEY FOR THE COST OF CONSTRUCTING THAT HOME?

A I DO.

Q HOW MUCH DO YOU OWE?

A I DON'T KNOW EXACTLY. $30,000.

Q OKAY. WHERE DID YOU RESIDE DURING THE TIME PERIOD THAT THE OLD HOME WAS DEMOLISHED AND THE NEW HOME WAS BUILT?

A I RESIDED AT MY FATHER-IN-LAW'S PLACE IN ALTAMONT.

Q OKAY. AND DID YOUR FATHER OR MOTHER EVER COME BY AND OVERSEE THE DEMOLITION AND NEW CONSTRUCTION?

A MY FATHER DID. I DON'T RECALL MY MOTHER BEING THERE, BUT MY FATHER DID, YES.

Q OKAY. MAX, DO YOU RECALL EVER HAVING CONVERSATION WITH YOUR MOTHER AT THE CEMETERY OVER IN VERNAL WHEN ONE OF YOUR RELATIVE'S BABY WAS BEING BURIED?

A I SURE DO.

Q AND COULD YOU RELATE YOUR RECOLLECTION OF THE CONVERSATION THAT OCCURRED?

A WE WERE AT THE GRAVESIDE FOR THAT LITTLE BOY AND IT WAS--THE GRAVE HAD BEEN DEDICATED. IT WAS OVER. THE CEREMONY WAS OVER. AND WE WERE TO GO TO LEAVE FOR A DINNER AT THE CHAPEL IN VERNAL AND WE WERE--I AND MY WIFE WERE SITTING IN MY PICKUP--

Q WAIT JUST A MOMENT BEFORE YOU PROCEED.

DO YOU RECALL WHEN THAT OCCURRED?

A NOT EXACTLY, NO.

Q OKAY. COULD YOU TRY AND TIE IT IN RELATIONSHIP TO THE DEMOLITION AND CONSTRUCTION OF THE HOME ON THE RANCH? WAS IT BEFORE OR AFTER?

A IT WAS AFTER.

Q AFTER THE DEMOLITION OF THE HOME?

A YES.

Q AND GO AHEAD AND PROCEED.

A AND WE WERE--THE CEREMONY WAS OVER AND WE WERE SITTING IN THE PICKUP WAITING FOR THE TRAFFIC TO GO. AND I HAD THE WINDOW DOWN AND MOTHER COME UP AND GRABBED MY ARM AND SAYS, "MAX," SHE SAYS, "WHAT IN THE WORLD IS THE MATTER WITH YOUR KIDS. WHAT HAVE WE EVER DONE THAT YOUR CHILDREN DON'T STOP AND VISIT?"

I DON'T KNOW WHAT THAT COME ABOUT. AND I SAYS, "MOTHER," I SAYS, "THIS IS NOT RIGHT." I SAYS, "THAT IS BETWEEN MY CHILDREN AND YOURSELF."

SHE SAYS--AND SHE TOLD ME, SHE SAYS, "WELL, YOU'RE THE CAUSE OF THE FRICTION BETWEEN US AND YOUR CHILDREN."

AND THAT WAS THE CONVERSATION.

Q OKAY. DID SHE STATE ANYTHING TO YOU REGARDING PAYMENTS FOR THE PROPERTY?

A NO.

Q WHO WAS PRESENT?

A ME AND MY WIFE AT THE TIME WHEN SHE DONE THIS.

Q WAS ANYONE ELSE WITH YOUR MOTHER?

A NO.

Q ALL RIGHT. MAX, DID YOU HAVE ANY OTHER CONVERSATION WITH YOUR FATHER PRIOR TO HIS DEATH REGARDING THE PAYMENTS, AFTER THE CONVERSATION AT YOUR HOME--OR THE OLD HOME WHEN IT WAS BEING DEMOLISHED?

A NO.

Q DID YOUR FATHER EVER ASK YOU FOR A PAYMENT ON THE RANCH?

A NO.

Q HAS YOUR MOTHER EVER ASKED YOU FOR A PAYMENT ON THE RANCH?

A NOT PREVIOUS TO MY FATHER'S DEATH. AFTER, YES.

Q ALL RIGHT. SO YOUR ANSWER TO THE QUESTION THEN IS SHE HAS ASKED FOR PAYMENT?

A YES.

Q OKAY. AND WHEN DID SHE FIRST ASK FOR PAYMENT FOR THE RANCH?

A I WOULD SAY ROUGHLY A YEAR AFTER FATHER PASSING.

Q OKAY. AND HOW DID SHE ASK YOU?

THE COURT: I DON'T KNOW WHEN THAT WAS.

MR. KUNZ: I THINK MRS. FISHER TESTIFIED AT THE BEGINNING OF HER TESTIMONY THAT GEORGE DIED--I WROTE DOWN APRIL 18TH, 1992.

THE COURT: OKAY.

Q (BY MR. KUNZ) OKAY. COULD YOU DESCRIBE WHEN IT WAS THAT SHE FIRST ASKED YOU FOR A PAYMENT?

A '93.

Q OKAY.

A ABOUT A YEAR AFTER MY FATHER'S PASSING.

Q NOW, SHE TESTIFIED THAT AFTER YOUR FATHER PASSED AWAY THAT THE FAMILY MET TOGETHER WITH PAUL BARTON AND THE MATTER WAS DISCUSSED; DO YOU RECALL THAT?

A YOU BET.

Q AND--

A NO, NO, NO, NOT THE FAMILY. THEY WERE FOUR OF US.

Q OKAY. WHO WAS PRESENT?

A THERE WAS MYSELF, MY MOTHER, MY BROTHER BRENT, AND MY SISTER SUSAN.

Q OKAY. AND WHERE DID THAT MEETING TAKE PLACE?

A IN BARTON'S OFFICE OR WHATEVER IT IS THERE IN SALT LAKE.

Q OKAY. AND DO YOU RECALL ANY DISCUSSION GOING BACK AND FORTH AT THAT TIME ABOUT YOUR NEED TO PAY FOR THE RANCH?

A YES.

Q AND IS THAT THE FIRST TIME THAT YOU SAY YOUR MOTHER ASKED YOU FOR PAYMENTS?

A YES.

Q OKAY. DO YOU RECALL RECEIVING THE NOTICE OF

TERMINATION IN THE MAIL?

A IT WASN'T--IT WASN'T DELIVERED BY MAIL, IT WAS DELIVERED BY THE LAW ENFORCEMENT.

Q YOU SAY LAW ENFORCEMENT DELIVERED IT TO YOU?

A YES, IT WAS HAND DELIVERED.

Q AND WHAT DID YOU DO AFTER RECEIVING THAT NOTICE?

A WELL, AFTER I GOT THROUGH SHAKING I WENT LOOKING FOR SOME HELP.

Q AND DID YOU FIND HELP?

A I HOPE.

Q WHAT DID YOU DO IN REGARD TO FINDING SOME HELP?

A THAT'S EXACTLY WHAT I DONE. THAT'S WHAT I DONE. WHEN I SEEN THAT I DIDN'T KNOW WHAT TO DO. I DON'T KNOW THE LAW. I HAVEN'T STUDIED THE LAW AND I FELT THAT AT THAT TIME IN MY LIFE I NEEDED SOME HELP.

Q OKAY. NOW, MAX, PRIOR TO YOUR RECEIVING THAT NOTICE, YOU HAD MET ME; ISN'T THAT TRUE?

A NO, I HADN'T MET YOU BEFORE THAT NOTICE.

Q IF--WELL, LET'S GO BACK.

WHEN DO YOU RECALL FIRST MEETING ME?

A I CAN'T--

MR. BIRD: I DON'T SEE THE MATERIALITY OF THIS. I RECOGNIZE THAT HE'S EMPLOYED MR. KUNZ, BUT I DON'T KNOW THAT THE BACKGROUND IS MATERIAL.

MR. KUNZ: THE ONLY MATERIALITY I WISH TO OFFER,

YOUR HONOR, IS IT'S CLEAR THAT I WAS REPRESENTING MAX AND JOYCE PRIOR TO THE TIME THAT THIS NOTICE WAS RECEIVED. MY NAME IS AT THE BOTTOM OF THE NOTICE AND I OF COURSE RESPONDED TO IT INDICATING IN THE COURSE THAT THE DOCUMENT SPEAKS FOR ITSELF AND THAT I'VE HAD CONTINUAL CONVERSATIONS WITH MR. BARTON--

THE COURT: DO YOU HAVE ANY QUESTION THAT HE WAS ALREADY INVOLVED BEFORE THE NOTICE?

MR. KUNZ: I'M JUST TRYING TO REFRESH HIS MEMORY THAT WE WERE INVOLVED BEFORE THAT TIME IS ALL.

MR. BIRD: WELL, I RECOGNIZE THAT--WELL, GO AHEAD.

THE COURT: I THINK MR. BIRD'S POINT IS WHAT DIFFERENCE DOES IT MAKE.

MR. KUNZ: WELL, I JUST DIDN'T WANT TO DISCREDIT MY EXHIBITS.

THE COURT: WE RECOGNIZE--

MR. BIRD: THERE HAVE BEEN NEGOTIATIONS BETWEEN PAUL BARTON AND MR. KUNZ, I KNOW THAT. BUT--

THE COURT: BEFORE THE NOTICE WAS SENT.

MR. BIRD: BEFORE THE NOTICE WAS SENT, BUT I CAN'T SEE THE MATERIALITY OF IT.

THE COURT: I CAN'T, EITHER.

MR. KUNZ: LET ME JUST SUFFICE BY--

Q (BY MR. KUNZ) MAX, IS IT SAFE TO SAY--AFTER HEARING THIS CONVERSATION, ISN'T IT SAFE TO SAY THAT I WAS HIRED PRIOR

TO THE TIME THAT YOU ACTUALLY RECEIVED THAT NOTICE TO REPRESENT YOU?

A WELL, IT COULD BE, YES. I THOUGHT IT WAS AFTER, BUT I COULD BE WRONG.

Q OKAY. MAX, AFTER--

A I DON'T KNOW WHEN IT WAS DONE AND HOW IT WAS DONE.

Q AND AFTER YOU RECEIVED THE NOTICE AND YOU CAME TO ME, DID YOU INSTRUCT ME TO--

MR. KUNZ: WHERE IS DEFENDANT'S EXHIBIT 6?

Q (BY MR. KUNZ) DID YOU INSTRUCT ME TO RESPOND IN YOUR BEHALF?

A YES.

Q AND I'M GOING TO SHOW YOU WHAT HAS BEEN MARKED AS DEFENDANT'S EXHIBIT 6 AND ASK YOU IF YOU'RE FAMILIAR WITH THAT DOCUMENT.

A YES.

Q AND DID YOU CONSIDER THAT A RESPONSE TO THE NOTICE, THEN?

A YES.

Q DID YOU FEEL THAT YOU NEEDED TO DO ANYTHING FURTHER OTHER THAN--AFTER I HAD SENT THAT NOTICE?

MR. BIRD: I OBJECT TO THAT AS INCOMPETENT, CALLING HOW HE FELT.

THE COURT: OVERRULED.

THE WITNESS: NOW, RESTATE YOUR QUESTION.

Q (BY MR. KUNZ) DID YOU FEEL THAT YOU NEEDED TO RESPOND FURTHER TO YOUR MOTHER AND YOUR BROTHER WHO WERE ACTING AS TRUSTEES OTHER THAN THE RESPONSE THAT I MADE IN YOUR BEHALF?

A I DON'T KNOW HOW TO ANSWER THAT. DID YOU FEEL--DID I FEEL THAT I SHOULD?

Q RIGHT. YOU PERSONALLY.

A I FELT THAT I HIRED YOU TO DO THAT.

Q OKAY. ALL RIGHT. THANK YOU.

A I DIDN'T FEEL THAT I COULD RESPOND.

Q ALL RIGHT. MAX, YOU PREVIOUSLY INDICATED THAT AT THE TIME YOU MET WITH YOUR FATHER AND MOTHER IN '88 OR '89 DURING THE DEMOLITION OF THE OLD HOME THAT YOU FELT YOU OWED YOUR PARENTS SOME MONEY?

A YES.

Q AND DID YOU FEEL THAT YOU STILL OWED THEM MONEY AT THE TIME THAT YOU HIRED ME TO RESPOND TO THAT NOTICE?

A YES.

Q AND THIS NOTICE SETS FORTH AN AMOUNT OF $57,100, I BELIEVE. DO YOU FEEL THAT THAT AT THE TIME WAS A PROPER AMOUNT?

MR. BIRD: I OBJECT TO THIS QUESTION. THE WITNESS HAS ALREADY SAID HE DIDN'T UNDERSTAND THE LAW, HE HIRED A LAWYER AND RELIED ON HIM AND I ASSUME IT'S THE LAWYER'S OPINION AND I OBJECT TO IT AS BEING INCOMPETENT FROM THIS

WITNESS.

THE COURT: WE DON'T KNOW THAT. OVERRULED.

Q (BY MR. KUNZ) MAX, DID YOU DISCUSS AN AMOUNT THAT YOU FELT THAT WAS LEGITIMATELY OWED WITH ME AS YOUR ATTORNEY?

A YES, WE TALKED ABOUT IT. YES.

Q AND WHAT WAS YOUR HONEST OPINION AT THE TIME AS TO THE AMOUNT THAT WAS OWED TO YOUR PARENTS?

A THIS FIGURE, THIS $57,000.

Q MAX, DURING THE PERIOD OF TIME FROM 1974 UP UNTIL THE TIME YOUR FATHER PASSED AWAY, HOW WOULD YOU DESCRIBE YOUR RELATIONSHIP?

A I WOULD DESCRIBE MY RELATIONSHIP REAL WELL WITH MY FATHER, EXCEPT ON OCCASION.

Q OKAY. AND DID THAT ONE OCCASION HAVE ANYTHING TO DO WITH THE ESCROW AGREEMENT AND YOUR PURCHASE OF THE RANCH?

A NO.

Q AND WHEN DID THAT OCCASION OCCUR?

A I DON'T--

Q IF YOU DON'T KNOW, THAT'S FINE.

A I DON'T KNOW.

Q DID YOU AND YOUR FATHER EVER DO BUSINESS TOGETHER DURING THAT PERIOD OF TIME, 1974 UP UNTIL HIS DEATH?

A YES.

Q WHAT KIND OF BUSINESS DID YOU DO TOGETHER?

A WE GOT IN--PUT IT THIS WAY, WE GOT IN TROUBLE WITH

SOME BAD MONEY. I CALL IT BAD MONEY. WE SOLD SOME CATTLE AND THE FELLOW THAT BOUGHT THE CATTLE WAS AN ANDREASON THAT RUN THE SALE BARN IN ROOSEVELT AND WE WERE BOTH STUCK WITH SOME BAD MONIES. I WAS STUCK WITH A LOT OF BAD MONEY. TO ME IT WAS A LOT OF BAD MONEY.

Q YOU SAY "BAD MONEY," WAS IT CHECKS--

A THE CHECKS WERE NO GOOD. JUST NO GOOD.

Q SO IT WAS BAD CHECKS?

A YES, IT WAS BAD CHECKS. MY FATHER WAS STUCK WITH A SUM, TOO. IT WAS A SMALLER AMOUNT. AND WE WENT TOGETHER AND HIRED--FOUND US AN ATTORNEY AND IT WAS A FELLOW OVER IN PRICE.

Q OKAY. WHEN DID THAT OCCUR?

A LET'S SEE, '79--ABOUT AROUND '81. I BELIEVE IT WAS '81. BETWEEN '81 AND '82, I DON'T KNOW EXACTLY WHEN IT WAS. I MEAN, I WOULD SAY--IF I RECALL IT RIGHT I RECALL IT WOULD BE '81. IT COULD'VE BEEN '80, BUT IT WAS RIGHT IN THAT AREA.

Q OKAY. AND DID YOU DO OTHER BUSINESS TRANSACTIONS WITH YOUR FATHER?

A WELL, I DONE WHAT HE ASKED. IF HE NEEDED HELP, I TRIED TO HELP HIM. OR AS FAR AS MONEY TRANSACTIONS I--

Q DID YOU EVER--DID YOUR FATHER EVER ASK YOU TO COME AND PERFORM LABOR ON HIS BEHALF--

A OH, YES. YES.

Q --DURING THAT PERIOD OF TIME?

A YES.

Q AND WHEN WAS THAT?

A ALL DIFFERENT TIMES. ALL DIFFERENT TIMES.

Q COULD YOU DESCRIBE THOSE THAT YOU RECALL?

A ALL OF IT. THERE WAS TIMES THAT THEY WANTED A FENCE BUILT AROUND THEIR YARD. AND THEY WANTED CORRALS ACROSS FROM WHERE THEY LIVED. AND THERE WAS TIMES THAT HE WAS DOING DIFFERENT WORKS WHERE WE CALL THE RANCH, THAT'S THE PLACE BELOW MOON LAKE. THERE WAS WATER SYSTEMS THAT WENT IN THERE AND THEY BUILT THEM A CABIN UP THERE. AND I WENT UP AND TRIED TO HELP ON THAT. AND I TRIED TO DO WHAT I THOUGHT THAT I SHOULD DO AS A SON FOR A FATHER.

Q OKAY.

A HE CAME UP. HE WAS WELCOME--HE KNEW HE WAS WELCOME TO EVERYTHING WE HAD.

Q AND DID HE COME UP AND USE YOUR THINGS?

A NOT EXTENSIVELY, NO. HE'D COME UP AND USE A HORSE. AND I USED A HORSE OF HIS AND RUINED HIM. ONE TIME I BORROWED A HORSE FROM DAD AND RUINED HIM.

Q HOW WOULD YOU DESCRIBE DURING THIS SAME PERIOD OF TIME YOUR RELATIONSHIP WITH YOUR MOTHER?

A AWFUL DAMN HARD.

Q WHY WOULD YOU DESCRIBE IT AS HARD?

A I DON'T KNOW.

MR. KUNZ: ONE MOMENT, PLEASE, YOUR HONOR.

I HAVE NOTHING FURTHER OF THE WITNESS AT THIS TIME.

THE WITNESS: CAN I BE EXCUSED FOR A MINUTE?

THE COURT: YES. JUST BRIEFLY.

BE BACK ON THE RECORD.

ALL RIGHT. YOU MAY CROSS EXAMINE, MR. BIRD.

MR. BIRD: THANK YOU.

CROSS EXAMINATION

BY MR. BIRD:

Q YOU SAY YOUR RELATIONSHIP WITH YOUR MOTHER WAS HARD; IS THAT THE WORD YOU USED?

A VERY HARD.

Q COULD YOU DESCRIBE IT IN DETAIL. WHAT WAS THE PROBLEM?

A I DON'T KNOW. I DON'T KNOW WHAT THE PROBLEM WAS.

Q WHEN DID IT START?

A PROBABLY THE TIME I GOT MARRIED.

Q WHEN WAS THAT?

A '60. 1960 OF NOVEMBER.

Q NOW, IN 1974 SHE SIGNED AN AGREEMENT WITH YOU FOR THE SALE OF PROPERTY. WAS THE RELATIONSHIP BAD AT THAT TIME?

A WELL, IT NEVER WAS REAL BAD, BUT WE NEVER HAD A REAL CLOSE RELATIONSHIP. NO, WE NEVER HAD A REAL BAD RELATIONSHIP, BUT WE DIDN'T HAVE WHAT YOU CALL A REAL CLOSE RELATIONSHIP, EITHER. WE NEVER HAD A TERRIBLE BAD RELATIONSHIP, NO.

Q NOW, IN 1975 WHEN THE TRUST AGREEMENT WAS EXECUTED

JAMES J. OMAN,

CALLED AS A WITNESS BY AND ON BEHALF OF THE DEFENDANTS IN THIS MATTER, AFTER HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. KUNZ:

Q MR. OMAN, WOULD YOU PLEASE STATE YOUR FULL NAME AND PLACE OF RESIDENCE.

A JAMES J. OMAN, BLUFFDALE, UTAH.

THE COURT: JUST A SECOND. O-M-A-N?

THE WITNESS: YES.

Q (BY MR. KUNZ) AND, MR. OMAN, ARE YOU FAMILIAR WITH MAX AND JOYCE FISHER?

A YES.

Q ARE YOU ALSO FAMILIAR WITH LARUE FISHER?

A YES.

Q AND DID YOU KNOW GEORGE FISHER PRIOR TO HIS PASSING AWAY?

A EVER SINCE I WAS IN THE 5TH GRADE.

Q YOU KNEW GEORGE EVER SINCE YOU WERE IN 5TH GRADE?

A YES, SIR.

Q OKAY. SO YOU LIVE OUT IN BLUFFDALE, BUT YOU USED TO LIVE OUT HERE?

A YES, WE LIVED IN ALTONAH FOR SEVEN YEARS. WE HELPED

HELENE'S BROTHER ON THE RANCH THERE AFTER HIS WIFE DIED.

Q NOW, IS THAT SEVEN YEARS RECENTLY OR WHEN YOU WERE A CHILD?

MR. BIRD: WOULD YOU MAKE THAT STATEMENT AGAIN, I DIDN'T HEAR IT.

THE WITNESS: WE MOVED BACK TO ALTONAH IN 1980 UNTIL '87.

MR. BIRD: THEN YOU SAID SOMETHING ABOUT A RANCH; WHAT DID YOU SAY?

THE WITNESS: WE HELPED HELENE'S BROTHER ON THE RANCH AFTER HIS WIFE DIED, THAT'S WHY WE COME BACK TO ALTONAH.

MR. BIRD: HELENE?

THE WITNESS: HELENE, H-E-L-E-N-E.

Q (BY MR. KUNZ) AND DURING THAT SEVEN YEARS THAT YOU LIVED OUT HERE, DID YOU HAVE AN OPPORTUNITY TO REKINDLE YOUR FRIENDSHIP WITH MR. GEORGE FISHER?

A YES.

Q AND HOW WOULD YOU DESCRIBE YOUR RELATIONSHIP WITH GEORGE FISHER AT THAT TIME?

A VERY GOOD. WE WERE HOME TEACHERS FOR SEVERAL YEARS AND WENT THROUGH THE DISCUSSIONS WITH THE GOSPEL PRINCIPALS WITH THEM. THEY WERE PREPARING TO GO TO THE TEMPLE AND WE WERE HELPING THEM.

Q WHEN YOU SAY "WE" IS THAT YOU AND YOUR WIFE?

A ME AND MY WIFE.

Q AND YOU WERE WORKING WITH GEORGE AND LARUE, I TAKE IT; IS THAT CORRECT?

A YES.

Q AND DID YOU CONSIDER GEORGE AND LARUE YOUR FRIENDS?

A YES.

Q AND WERE THEY REAL GOOD FRIENDS OR CASUAL FRIENDS OR JUST CHURCH ACQUAINTANCES?

A WELL, I THOUGHT THEY WERE GOOD FRIENDS.

Q OKAY. YOU WOULD CONSIDER THEM GOOD FRIENDS?

A YES.

Q ALL RIGHT. AND HOW DID YOU GET TO KNOW MAX?

A WELL, WE WERE NEIGHBORS. WHERE THEY LIVED WAS JUST A SHORT DISTANCE FROM OUR PLACE.

Q OKAY. AND DID YOU EVER--WELL, FIRST OF ALL, LET ME ASK YOU, WHEN YOU DECIDED TO MOVE OR LEAVE ALTONAH, DID YOU EVER HAVE DISCUSSION WITH MAX ABOUT THE POSSIBILITY OF HIS BUYING YOUR HOME AND ACREAGE THERE IN ALTONAH?

A YES.

Q AND HOW WOULD YOU HAVE VIEWED THE MARKET AT THAT TIME AS FAR AS YOUR ABILITY TO SELL YOUR HOME?

A WELL, WE WEREN'T PARTICULARLY WANTING TO SELL THE PLACE. WE'D KIND TO LIKE TO KEEP IT AS A SUMMER HOME MORE OR LESS AND WE WEREN'T TOO MUCH INTERESTED IN SELLING AT THAT TIME.

Q WOULD YOU HAVE SOLD IT TO MAX?

A WELL, PROBABLY.

Q EXCUSE ME?

A I THINK SO IF HE'D PURSUED IT.

Q AND YOU DID HAVE DISCUSSIONS WITH HIM ABOUT PURCHASING IT?

A WELL, YEAH, HE THOUGHT HE'D LIKE THE PLACE FOR HIS SON-IN-LAW AND DAUGHTER TO LIVE.

Q OKAY. BUT DID HE EVER TALK ABOUT THE POSSIBILITY OF HIS PURCHASING THE HOME TO LIVE IN IT RATHER THAN DEMOLISHING THE OLD HOME ON THE RANCH?

A NO.

Q NEVER DISCUSSED IT WITH YOU?

A NOT THAT I RECALL.

Q OKAY. BUT WAS YOUR PLACE FOR SALE AROUND THAT PARTICULAR TIME?

A NO.

Q IT WAS NOT. WHEN DID YOU TRY AND SELL YOUR HOME?

A WE DIDN'T TRY AND SELL IT. A COUPLE APPROACHED US ON BUYING IT. WE HAD IT LEASED. AND A COUPLE APPROACHED US AND WE SET A PRICE AND WE SET IT UP WHERE WE THOUGHT THEY MIGHT NOT BUY IT, BUT THEY TOOK IT.

Q BUT AT WHAT TIME DID YOU LEASE THE PROPERTY WHEN YOU MOVED FROM THE AREA?

A WHEN WE MOVED IN--IT WAS '87.

Q '87. AND SO AFTER THAT--

A OR '88.

Q '88?

A UH HUH.

Q ALL RIGHT. MR. OMAN, AT ANY POINT IN TIME DID YOU BECOME AWARE OF A PROBLEM BETWEEN MAX AND JOYCE AND GEORGE AND LARUE REGARDING THE PURCHASE BY MAX OF THE FARM AND RANCH THAT HE LIVED ON?

A YES, WE WERE AWARE OF THAT.

Q HOW DID YOU BECOME AWARE OF IT?

A WELL, I GUESS BY TALKING TO MAX AND TALKING TO GEORGE AND LARUE.

Q OKAY. AND WHAT WAS YOUR UNDERSTANDING OF THE PROBLEM?

A WELL, IT WAS DISCUSSED AT LEAST TWICE WHILE WE WERE--WHEN WE WERE MAKING OUR VISITS WITH GEORGE AND LARUE. AND IT WAS BROUGHT UP THAT MAX HADN'T MADE ANY PAYMENTS. AND LARUE SAID, "I THINK WE SHOULD PUSH THAT AND GET THE PAYMENTS, PLUS INTEREST ON THE PAYMENTS."

Q AND WHAT WAS GEORGE'S REACTION?

A HE SAID, "I DON'T THINK WE SHOULD CHARGE INTEREST ON IT."

Q OKAY. DID HE EVER INDICATE A DESIRE TO FORCE MAX INTO PAYING?

A NO.

MR. BIRD: JUST A MINUTE. I OBJECT TO THAT AS

LEADING AND ASK THAT HE GIVE THE CONVERSATION ONLY.

THE COURT: I DON'T KNOW HOW YOU GET TO A NEGATIVE OTHER THAN ASK THAT KIND OF QUESTION.

MR. BIRD: WELL, BY ASKING WHAT THE CONVERSATION WAS.

THE COURT: ASK HIM TO RELATE THE ENTIRE CONVERSATION, COUNSEL.

Q (BY MR. KUNZ) COULD YOU RELATE THE ENTIRE CONVERSATIONS IN THIS REGARD.

A WE KNEW THE SITUATION AND WE--

Q WHEN YOU SAY "WE" ARE YOU STILL REFERRING TO YOU AND YOUR WIFE--

A ME AND MY WIFE, YES.

Q OKAY.

A AND IF ANYTHING WOULD HAPPEN TO GEORGE THAT THERE WOULD BE PROBLEMS. WE WERE AWARE OF THAT. AND WE WERE TRYING TO GET--PUSHING A LITTLE BIT ON BOTH OF THEM TO TRY TO GET IT SETTLED--YOU KNOW--WHILE--

Q WERE YOU ACTING AS A MEDIATOR?

A PARDON?

Q WERE YOU ACTING AS A MEDIATOR TRYING TO GET--

A THAT'S WHAT WE WERE TRYING TO DO.

Q OKAY. AND DID YOU HAVE ANY SUCCESS?

A NO.

Q WHY NOT?

A WELL, BECAUSE OF PRIDE AND TEMPERS, I THINK. THEY JUST COULDN'T TALK.

Q EXCUSE ME?

A BECAUSE OF PRIDE AND TEMPERS. THEY COULDN'T TALK ABOUT IT. THEY COULDN'T DISCUSS IT.

Q "THEY" MEANING MAX AND JOYCE AND GEORGE AND LARUE?

A WELL, I THINK IT WAS MOSTLY BETWEEN MAX AND HIS MOTHER. GEORGE HE KIND OF STAYED CLEAR.

Q GEORGE STAYED CLEAR. OTHER THAN YOUR PREVIOUS STATEMENT THAT MAX HAD INDICATED HE DIDN'T THINK THAT THERE SHOULD BE ANY INTEREST CHARGED, DID YOU WITNESS ANY OTHER CONVERSATIONS OR DO YOU RECALL ANY OTHER WORDS THAT GEORGE SAID SPECIFICALLY IN REGARD TO MAX PAYING THE DEBT?

A HE DIDN'T SAY ANYTHING ABOUT THE DEBT. THE ONLY THING I HEARD HIM SAY WAS--LARUE SAYS WE SHOULD HAVE THE FULL PAYMENT, PLUS INTEREST, AND GEORGE SAYS, "I DON'T THINK WE SHOULD CHARGE INTEREST."

Q OKAY. THAT'S WHAT YOU--

A I HEARD HIM SAY THAT TWICE.

Q YOU HEARD HIM SAY IT TWICE?

A RIGHT.

Q AND DID YOU SENSE THAT THIS WAS A SORE SPOT BETWEEN GEORGE AND LARUE?

A THERE WAS NO DOUBT ABOUT IT. IT WAS.

Q OKAY. AND DID YOU ELECT NOT TO PURSUE ANY FURTHER

OR DID YOU TRY TO PURSUE IT FURTHER AFTER THAT TIME?

A NO. NO, WE DIDN'T. IT WAS REALLY NOT OUR AFFAIRS JUST AS NEIGHBORS WE JUST WANTED TO SEE IT SETTLED.

Q BECAUSE YOU HATED TO SEE IT COME TO THIS; IS THAT CORRECT?

A RIGHT. I HATED TO SEE IT COME TO A COURT TRIAL BECAUSE THAT'S--THE ONLY WINNERS HERE ARE THE ATTORNEYS.

Q WELL, THANK YOU, MR. OMAN, I APPRECIATE THAT.

MR. KUNZ: YOUR WITNESS.

CROSS EXAMINATION

BY MR. BIRD:

Q THIS CONVERSATION TOOK PLACE IN THE HOME OF GEORGE AND LARUE OR WAS IT IN MAX'S HOME?

A IT WAS IN GEORGE AND LARUE'S HOME.

Q AND YOU SAY MAX WAS THERE?

A NO.

Q MAX WAS NOT THERE?

A NO.

Q SO HE WASN'T PARTY TO THIS--

A NO.

Q --AND HE DIDN'T--YOU DIDN'T HEAR ANY COMMENT FROM HIM BECAUSE HE WASN'T THERE?

A RIGHT.

Q THIS IS PURELY BETWEEN THE FOUR OF YOU?

A RIGHT.

Q DID YOU EVER DISCUSS THIS WITH MAX?

A YES.

Q DID YOU DISCUSS IT LATER WITH LARUE?

A NO, I DON'T THINK WE EVER TALKED TO JUST LARUE OTHER THAN WHEN GEORGE WAS THERE ABOUT IT.

Q AT THAT TIME?

A RIGHT.

MR. BIRD: THAT'S ALL.

MR. KUNZ: I HAVE NOTHING FURTHER.

WE'D LIKE TO CALL HELENE OMAN.

THE COURT: MAY THIS WITNESS BE EXCUSED?

MR. KUNZ: HE MAY.

MR. BIRD: YES.

HELENE J. OMAN,

CALLED AS A WITNESS BY AND ON BEHALF OF THE DEFENDANTS IN THIS MATTER, AFTER HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. KUNZ:

Q PLEASE STATE YOUR FULL NAME.

A HELENE J. OMAN.

Q AND, MRS. OMAN, YOU ARE MARRIED TO JAMES OMAN?